No. 91-6382-CFH
Status: GRANTED
CAPITAL CASE

Title: Robert Wayne Sawyer, Petitioner
v.
John Whitley, Warden

Docketed:
November 13, 1991

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Trenticosta,Nicholas J.

Counsel for respondent: Pendergast,Dorothy Ann

Entry	Date	Note	Proceedings and Orders
2	Nov 13 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
7	Nov 13 1991	C	Application (A91-347) for a stay of execution of sentence of death, submitted to Justice Scalia.
5	Nov 14 1991		Petition GRANTED.
			**********
8	Nov 14 1991		Application (A91-347) referred to the Court by Justice Scalia.
9	Nov 14 1991		(A91-347) The application for a stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is granted. The motion for leave to proceed informa pauperis and the petition for a writ of certiorari are granted.
13	Dec 30 1991		Brief of petitioner Robert Wayne Sawyer filed.
10	Jan 2 1992		SET FOR ARGUMENT TUESDAY, FEBRUARY 25, 1992. (3RD CASE)
11	Jan 2 1992		Joint appendix filed.
		*	Joint Appendix received in two volumes.
14	Jan 14 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Jan 21 1992		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
19	Jan 21 1992		Record filed.
		*	Original proceedings U. S. District Court, Eastern District of Louisiana (2 BOXES)
20	Jan 21 1992		Record filed.
		*	Partial proceedings and briefs U.S. Court of Appeals forthe Fifth Circuit.
15	Jan 27 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
18	Jan 27 1992		Brief of respondent John P. Whitley, Warden (TO BE PRINTED) filed.
17	Jan 28 1992		CIRCULATED.
21	Jan 29 1992	X	Brief amicus curiae of United States filed.
23	Jan 29 1992	X	Brief amicus curiae of Criminal Justice Legal Foundation filed.
22	Jan 31 1992	X	Brief of respondent John P. Whitley, Warden filed.
24	Feb 17 1992	X	Reply brief of petitioner Robert Sawyer filed.
25	Feb 25 1992		ARGUED.

(2)

Supreme Court, U.S.
FILED
NOV 13 1991
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NO. 91-6382

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ORIGINAL

ROBERT WAYNE SAWYER,

Petitioner,

V.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
Angola, Louisiana,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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* NICHOLAS J. TRENTICOSTA
SARAH OTTINGER
R. NEAL WALKER
Loyola Death Penalty Resource Center
210 Baronne Street, Suite 608
New Orleans, Louisiana 70112
(504) 522-0578

Counsel for
Robert Wayne Sawyer

* Counsel of Record

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QUESTIONS PRESENTED

1. What is the appropriate standard to be applied when determining whether the "'fundamental miscarriage of justice'" exception, Smith v. Murray, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition?

2. Under the standard to be used when determining whether the "'fundamental miscarriage of justice'" exception set forth Smith v. Murray, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition, should the focus be strictly on the defendant's legalistic "eligibility" to be sentenced to death, and fail to require a fact-based examination of the accuracy of the jury's decision, including whether: (i) the jury was presented with false facts; and (ii) the jury was not presented with true, mitigating facts?

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NO. _____

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner, Robert Wayne Sawyer, is scheduled to be executed by the State of Louisiana on November 15, 1991, between the hours of midnight and 3:00 a.m. Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

Mr. Sawyer seeks review of the circuit court's judgment dismissing his request for habeas corpus relief. Sawyer v. Whitley, No. 91-3658, slip op. (5th Cir. October 10, 1991). (App. 1). The circuit court affirmed the district court's judgment dismissing the petition for habeas corpus relief. Sawyer v. Whitley, No. 90-4035, slip op. (E.D. La. July 10, 1991).

All claims were exhausted in state court. The state trial

court denied post-conviction relief on October 5, 1990, and on December 10, 1990. The Louisiana Supreme Court denied Mr. Sawyer's applications for discretionary writs, without opinion. Sawyer v. Whitley, 567 So.2d 597 (La. October 7, 1990); Sawyer v. Whitley, 572 So.2d 49 (La. December 12, 1990).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit dismissed Mr. Sawyer's petition for habeas corpus relief on October 10, 1991. On November 12, 1991, his Petition for Rehearing, Suggestion for Rehearing En Banc and Motion for Stay of Mandate and Stay of Execution Pending Application for Certiorari were denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254 (1). The Court's authority to stay the scheduled execution is invoked pursuant to 28 U.S.C. secs. 2101 (f) and 2251.

CONSTITUTIONAL PROVISIONS

This petition involves the application of the Eighth and Fourteenth Amendments to the United States Constitution.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

Mr. Sawyer was convicted of first degree murder and sentenced to death in the 24th Judicial District Court, Jefferson Parish, Louisiana on September 19, 1980. His conviction and sentence were affirmed on direct appeal. State v. Sawyer, 422 So.2d 95 (La. 1982). This Court vacated and remanded the case back to the Louisiana Supreme Court. Sawyer v. Louisiana, 463 U.S. 1223 (1983). On remand, the court again affirmed the conviction and sentence. State v. Sawyer, 442 So.2d 1136 (La. 1983).

Mr. Sawyer filed a state post-conviction petition, and appealed denial of relief. The Louisiana Supreme Court remanded the case to the state district court for a hearing on ineffective assistance of counsel "[i]n view of the fact that counsel assigned by the trial judge in this capital case was not admitted to the bar for at least five years prior to trial as required by La.C.Cr.P. Art. 512." Sawyer v. Maggio, 450 So.2d 355 (La. 1984). After an evidentiary hearing (where no evidence of prejudice was presented), the Louisiana Supreme Court, by a 4 to 3 vote, affirmed the trial court's denial of relief without a written opinion. Sawyer v. Maggio, 479 So.2d 360 (La. 1985).

Mr. Sawyer filed a writ of habeas corpus with the United States District Court for the Eastern District of Louisiana on

January 20, 1986. The district court denied the writ, without an evidentiary hearing, and a divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the denial. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). The Fifth Circuit then granted rehearing en banc. By a vote of 9 to 5, the panel's opinion was affirmed. Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989).

This Court granted certiorari on January 16, 1990. The Court, in a 5-4 opinion, affirmed Fifth Circuit's decision. Sawyer v. Smith, 110 S.Ct. 2822 (1990).

Petitioner filed a state post-conviction petition on October 3, 1990, which was denied on October 5, 1990. The Louisiana Supreme Court denied the application for discretionary writs without opinion on October 7, 1990. Sawyer v. Whitley, 567 So.2d 597 (La. 1990). Mr. Sawyer filed a second Petition for Writ of Habeas Corpus in the district court on October 8, 1990.[1]

Subsequently, Petitioner filed a state post-conviction petition on November 27, 1990 which was denied on the merits on December 10, 1990. Application for discretionary writs to the Louisiana Supreme Court resulted in denial on December 10, 1990, without opinion. Sawyer v. Whitley, 572 So.2d 49 (La. 1990). The exhausted claim raised was filed in the district court in Mr. Sawyer's First Supplemental and Amended Petition.

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[1] Mr. Sawyer's Application for Stay of Execution, filed with the habeas petition, was deemed moot after Governor Roemer, granted Mr. Sawyer a 30-day reprieve.

On December 12, 1990, the district court granted Mr. Sawyer's Application for Stay of Execution and ordered an evidentiary hearing "on all issues raised in the pleadings currently before the Court, including abuse of the Writ." Subsequently, in a minute entry dated December 18, 1990, the district court revised its order regarding the scope of the evidentiary hearing, limiting it to Claim 4 of the habeas petition: petitioner's allegations regarding design defects in Louisiana's electric chair.[2]

On July 17, 1991, the district court dismissed Mr. Sawyer's petition for habeas relief and later denied Mr. Sawyer's Application for Certificate of Probable Cause.

On August 16, 1991, the Fifth Circuit Court of Appeals granted Mr. Sawyer's Application for Certificate of Probable Cause and stayed Mr. Sawyer's execution based on "the 'actual innocence of death' exception to the cause and prejudice requirement imposed by McCleskey v. Zant, ____ U.S. ____, 111 S.Ct. 1454 (1991), that has not been addressed before in this circuit." After expedited briefing and oral argument, the circuit court denied habeas relief in an October 10, 1991 opinion. On November 12, 1991, the court denied Mr. Sawyer's Petition for Rehearing, Suggestion for Rehearing En Banc, and Motion for Stay of Execution Pending Resolution of Petition for Rehearing and Suggestion for Rehearing En Banc And Motion for

[2] The claim is now moot. As of September 15, 1991, lethal injection is the method of execution in Louisiana.

Stay of Mandate and Stay of Execution Pending Application for Certiorari.

B. Facts Material to Innocence

1. Introduction[3]

Mr. Sawyer's conviction and sentence of death are founded on lies. The state hid exculpatory evidence, failed to reveal that its star witness had been promised immunity in exchange for her testimony, and knowingly offered false evidence at trial. In addition, the sentence of death is premised on false and misleading evidence presented by an incompetent and inexperienced trial attorney.[4]

2. The Undisclosed Immunity Agreement

At trial, Cynthia Shano was the only witness who testified to the events leading up to Arwood's death. She was present at the scene of the crime, her own home. The state bought Shano's testimony with a promise of immunity and failed to reveal the deal to defense counsel. Just over a year ago, present counsel discovered that "the prosecutor wanted to charge [Shano] with the crime, but that she made a deal that if she would testify against

[3] All allegations of fact in this application were proffered with supporting documents and affidavits in the Petition for Habeas Corpus filed in October, 1990, and the Supplemental Petitions filed after that date. All appendices (App.) references refer to the petition.

[4] Contrary to state law, which requires that capital defendants be represented by attorneys with at least five years' membership in the bar, Mr. Sawyer was represented at trial by an attorney who had become a member of the bar less than two years prior to trial. Sawyer v. Butler, 848 F.2d at 586 (citing La.C.Cr.P. art. 512).

both [Charles Lane and Robert Sawyer] she would not be prosecuted." A friend has confirmed that Shano "has explained that she did not get in trouble for what happened because she turned state's evidence." Shano's now-deceased sister, a state witness at trial, told her husband that "Cynthia Shano made a deal to testify against the two men in exchange for not being arrested for the crime." The sister told her husband that she was present when Shano met with the assistant district attorney and discussed the deal.

3. The Uundisclosed Perjury

Shano lied on the witness stand and the prosecutor was fully cognizant that testimony he elicited was untruthful. In response to the prosecutor's questioning on direct, Shano testified that she was not drinking at the time the crime occurred; police had informed the prosecutor that they detected an odor of alcohol immediately following the crime. Defense counsel was not informed of this fact. In answer to lengthy questioning by the prosecutor, Shano also testified to her great love of her children. Yet prior to the commission of the crime and following it, the state was monitoring Shano for abuse and neglect of those well-loved children (a fact known to the prosecutor).

4. The Undisclosed Eyewitness' Statement And Physical Evidence

The only evidence implicating Mr. Sawyer in the commission of the murder was Shano's testimony and Mr. Sawyer's print, among other unidentifiable prints, on a can of lighter fluid found at

the scene. The state concealed evidence that would have destroyed the credibility of every aspect of its first degree murder case against Mr. Sawyer: an exculpatory eyewitness statement to police[5] and a second can of lighter fluid found on the scene of the crime.

Shano's four year old son, Wayne, witnessed the crime and knew that Mr. Sawyer was not involved in burning the victim.[6] On the day following the crime, Wayne told police that Mr. Sawyer had not set the victim on fire, that it was "the other man who had done it." He told police that in fact Mr. Sawyer "tried to help the lady," but that Sawyer's effort at preventing the arson was met with physical violence when "the man had slapped Bobby [Sawyer] back" and "Bobby fell back into the chair." (App. 6, Affidavit of Diane Thibodeaux, at 3).

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[5] Philip Boudousque, the prosecutor at trial, illegally withheld a crucial eyewitness statement in another capital case, then lied to conceal its existence. The case was tried within three months of Mr. Sawyer's case. In Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985), Boudousque informed defense counsel, in pretrial discovery, that an eyewitness had identified Lindsey as the perpetrator. Id., at 1037. The actual statement by the witness was recorded in a police report which Boudousque withheld from defense prior to trial. The witness told police that "he did not see the perpetrator's face" and that viewing photographs "would be useless because he did not see the perpetrator's face." Id., at 1036 (emphasis added). The 5th Circuit panel was outraged by Boudousque's misconduct and deceit and reversed the conviction stating, "[s]uch conduct would be reprehensible in an ordinary case; where a man's life is at stake, it is beyond reprehension." Id., at 1040 (emphasis added).

[6] Mr. Sawyer's conviction for first degree murder is premised upon finding aggravated arson. Aggravated arson was found as an aggravating circumstance by the jury in sentencing phase. Sawyer v. State, 422 So.2d at 99 n. 8.

Wayne also told police how the victim was set on fire. He said that the other man poured lighter fluid from a can into the "shiny thing you put cigarettes in" and then on the victim. Then he showed police where the evidence of the arson was located: in the trash. Police went through the trash and discovered the bottom half of a cigarette holder and a second can of lighter fluid. (App. 6, at 3). Neither Wayne's statement exculpating Mr. Sawyer from participation in aggravated arson nor the existence of a second can of lighter fluid were revealed to Mr. Sawyer at trial.

5. Unpresented Compelling Mitigating Circumstances

Defense counsel's incompetence during the penalty phase equaled, if not surpassed, the state's deceit in withholding crucial exculpatory evidence. Mr. Sawyer has multiple, crippling disabilities that render him incapable of understanding complex situations in anything but the most concrete terms and which severely compromise his ability to control violent reactions to complex emotional situations.[7] The probable etiology of Mr. Sawyer's impairments is the unrelenting and violent abuse he and his mother received at the hands of his sadistic father and tormented mother.

Trial counsel abdicated his role as advocate in the sentencing phase of Mr. Sawyer's trial; he failed to investigate

[7] This Court previously commented that Mr. Sawyer committed acts of violence against the victim "for reasons that are not clear." Sawyer v. Butler, 110 S.Ct. at 2825. The reasons are now quite clear.

and present a documented history of organic brain damage and mental retardation, including four prior mental health commitments, and failed to discover and interview easily accessible relatives who could give heart-wrenching testimony as to the cruelty and violence that pervaded Robert Sawyer's childhood home. Instead, trial counsel relied upon a state psychiatrist who diagnosed Robert as a sociopath after a 20 minute interview, without the benefit of a medical or mental health history and without ruling out organic brain damage. Effective representation would have revealed the following:

i. **Early Childhood: Abandonment, Abuse, and Neglect**

Robert Wayne Sawyer was born on October 8, 1950 in Memphis, Tennessee to a sick mother, Betty, and a sadistic father, Robert Sr.[8] His mother gave birth to twins, Robert Wayne and Betty Jane. The three returned from the hospital to the family's crowded, dilapidated two room shack in rural Tennessee where Mr. Sawyer grew up. The house had no electricity, no running water, not even an outhouse. At the time seven family members shared the two rooms: Mr. Sawyer, his father and mother, his grandmother and grandfather, and his sisters Glenda Sue, age four, and Betty Jane.

Mr. Sawyer's mother, Betty, had been constantly ill and bedridden during the nine months of her pregnancy, suffering from

[8] Family member refer to the father as "Robert" and to Mr. Sawyer as "Robert Wayne." They appear as such in quoted affidavits. Otherwise, they will be referred to as "Sawyer, Sr." and "Mr. Sawyer," respectively.

Asian flu and uremic poisoning. Not long after returning home from the hospital, she became more and more depressed and withdrawn. She twice tried to kill her newborn son, once with a fire poker and once by suffocation. Less than four months after giving birth, Betty Sawyer committed suicide leaving her sadistic husband in charge of the infants.

Family members were readily available to testify to the torture and abuse visited upon Mr. Sawyer and his mother at the hands of his father. They were never contacted by trial counsel. They state in their affidavits that the father beat, raped, and "treated [Ms. Sawyer] like a dog," (App. 8), "as if he hated her." (App. 7). Three months after Mr. Sawyer's birth, his mother "went outside and sat in the back seat of the family car. She propped the shotgun up against the front seat, aimed it at her heart, and pulled the trigger with her toe. She died immediately." (App. 8) Sawyer Sr.'s "overbearing personality, hatefulness, and abuse destroyed [Betty's] spirit and her will to live." (App. 10).

Sawyer, Sr.'s treatment of his first wife was consistent with his treatment of others when he was growing up. Again and again, relatives describe a cruel, hateful, and violent man. Most were afraid of him and "tried to stay away from him" as much as possible. (App. 10). Sawyer, Sr. took sadistic pleasure in abusing others and "was only happy when other people were miserable." (App. 7). He "seemed to take pleasure in physically hurting his sisters," (App. 10), and, according to one sister

would "get my sister and me alone and terrorize us then laugh about it." (App. 8).

Sawyer Sr. "grew up believing he could do anything he wanted to other people and get away with it." (App. 8). The end result was disastrous, particularly for the women and children that bore the brunt of Robert's rage:

> Ever since I have known Robert Sawyer, Robert Wayne's father, he has been mean and abusive to everyone he comes in contact with. He has never had a kind word or feeling for anybody. All his life, he has bullied and beaten his family from his son Robert Wayne to his second wife, Mott and his grandson Scotty. Robert always demanded that things be exactly the way he said and that no one do anything that he didn't say was okay.... He was just that kind of man who always had to prove that his word was law.

(App. 9).

Following his wife's suicide, Sawyer, Sr. undertook proving his word was law to "the only thing in the world that was his and that he could do anything he wanted with" -- his son, Mr. Sawyer. Mr. Sawyer's twin sister, Betty Jane, mercifully escaped the same fate. Her aunt, Virginia Kimberlin, took her in and raised her, leaving Robert Wayne to a fate that changed the course of his life. She remembers

> little Robert Wayne seemed to bear the full weight of his father's anger and frustration. Robert worked him in the fields and clearing land like he was a grown-up. Nothing Robert Wayne could ever do was right according to his father. From third grade on, he was in special education classes and his father made fun of him and called him names for that. Robert also called that poor child things I wouldn't repeat. He would beat him with anything he could get his hands on. I remember once, after Robert Wayne had been horse whipped by his father, I told him something about not treating that boy so bad and he told me that Robert Wayne was the only thing in the world that was his and that he could

do anything he wanted with.

(App. 8).

As a small child, "Robert Wayne was beaten, taunted, humiliated, and rejected by his father." (App. 6). In addition to beating his son, the father "wouldn't let [Mr. Sawyer] go places and do things with the other boys. When other cousins would visit the house, Robert Wayne was ordered to work, usually doing meaningless chores, so he was never allowed to play with them." (App. 8). But the chores were not only meaningless ones, designed to prevent Mr. Sawyer from playing with other children. The father also forced his son to do difficult work, and cursed and beat him "at the drop of a hat" when the child failed to fulfill his father's impossible demands.

> As soon as Robert Wayne was old enough to walk and talk, his father had him doing chores all day long. By the time he was eight years old or so, he was having to do things like clearing land, really men's work. Robert treated his son like a slave with never a kind word or show of any love or affection. My husband would always say how he could hear Robert cursing Robert Wayne all the way across the road.

(App. 7).

Sawyer Sr.'s abuse of his son had a lasting effect, which became apparent as Mr. Sawyer grew into a teenager. The abuse is the likely etiology of organic damage to the prefrontal lobe of Robert Wayne's brain. As one aunt so aptly summarized:

> Robert Sawyer destroyed his wife's life and if that wasn't enough, he destroyed his son's too. I believe if Robert Wayne had gotten the care and love and attention he needed when he was a child, he wouldn't be where he is today.

(App. 6).

ii. Mental Retardation and Neurological Damage

Mr. Sawyer is mentally retarded with an IQ of 68. He never progressed beyond the third or fourth grade level in school. The etiology of his learning difficulties is unclear, but mental retardation exacerbated by neurological impairment resulted in a "severely impaired ability to perform abstract thinking, to make generalizations or to understand abstract concepts." (App. 1).

After failing first grade twice, Mr. Sawyer was "socially promoted" to the second grade, where he received five "F"s and three "D"s. After three full years in school, he scored at a zero level in reading, math, and spelling. He was then placed in an Educable Mentally Retarded class and remained there until he dropped out of school. By the time Mr. Sawyer reached his eighth year in school, at age 14, his teacher reported that his social progress was "poor" and that he "has developed an attitude that the world is against him, however I believe this is due to his home environment." In his last year in school in Millington, he was reading and spelling at a fourth grade level and his arithmetic performance was consistent with a third grade level. (App. 5).

By the time Mr. Sawyer was a teenager, his ability to control his impulses was impaired by severe brain damage and aggravated by Schizophrenia. At age 14, Mr. Sawyer began his first of a series of mental health treatments. In February, 1965, he was referred to the Gailor Mental Health Clinic in

Memphis where the diagnosis was: "moderately retarded, chronic brain syndrome manifested by moderate retardation and abnormal EEG." At that time, he was prescribed Prolixin, an anti-psychotic medication, and Dilantin, anti-seizure medication. (App. 4)

His thought process and his neurological impairments began to worsen, and Mr. Sawyer was placed in the psychiatric unit of the John Gaston Hospital in Memphis on June 17, 1966. He was prescribed Thorazine, a powerful psychotropic medication for the treatment of Schizophrenia and psychosis. He was discharged from this facility on June 24, 1966. The final diagnosis was similar to the findings made at the Gailor Clinic: "Chronic Brain Syndrome with unknown cause manifested by mild mental retardation and abnormal EEG with behavioral disturbances." (App. 4).

On August 16, 1966, at age 15, Mr. Sawyer was adjudicated incompetent and committed to the Western State Psychiatric Hospital in Bolivar, Tennessee. (App. 4). During his commitment, Mr. Sawyer underwent shock treatments and was prescribed anti-psychotic medication and tranquilizers. The records indicate that he was provisionally diagnosed as "mental deficiency, idiopathic, mild, with psychotic reaction". Mellaril and phenobarbital were prescribed. It was reported that he exhibited "childish behavior and lack of responsibility," and his privileges were curtailed when "he began to annoy the girls on the hospital grounds." He was then administered "E.C.T.s as well as tranquilizing drugs with little improvement in his mental

attitude." (App. 4).

The psychiatric records show "[e]motional deterioration, inappropriate affect, childish behavior, grimacing and mannerisms noted...apperception [power of reasoning] poor, patient does not realize the degree of his psychogenic dissolution. Insight, judgment and reasoning defective." His final diagnosis added the disease which he had been medicated for the previous two years -- "Schizophrenic reaction, childhood type." Upon discharge, Mr. Sawyer's psychiatrist noted the following: "stress: severe; predisposition: severe; impairment: severe, apparently this patient failed to identify himself with parents and siblings and lack of ego strength and ego ideal is the dynamic cause of the patient's illness; Prognosis: guarded." On January 10, 1967, Robert was once again found to be "not competent to conduct his own affairs." Yet he was discharged from the hospital. (App. 4).

Last year, Mr. Sawyer was competently evaluated by a neurologist, a psychiatrist, and a psychologist. The results show severe brain damage in the prefrontal areas and mild to moderate mental retardation. As the evaluators explain, unless he is in structured, supervised environments, Mr. Sawyer has difficulty controlling aggression. He also does not understand the consequences of it. He cannot comprehend abstract concepts and is incapable of making well-reasoned decisions. In other words, the same problems reported in his records from teenage mental health hospitalizations still existed at the time of the

murder, and the trial, and to this day.

Dr. Alec Whyte, an eminently qualified practitioner and professor of psychiatry, has diagnosed Mr. Sawyer as suffering from Organic Personality Syndrome secondary to frontal lobe brain damage and mild mental retardation. He made his diagnosis after careful review of school records, psychiatric records, summaries of social history, and an interview lasting 2 hours and 45 minutes.

Dr. Whyte found that Organic Personality Syndrome (formerly Organic Brain Syndrome) as described in the diagnostic manual of the American Psychiatric Association (DSM III-R) "reads like a veritable summary of the life history of Robert Sawyer."

> The clinical syndrome in a particular person depends principally on the nature and localization (in the brain) of the pathological process. A common pattern is characterized by affective instability and impairment in impulse control or social judgment. The individual may be belligerent or have temper outbursts that are grossly out of proportion to any precipitating psychosocial stressor. Socially inappropriate actions, such as sexual indiscretions, may be engaged in with little concern for the consequences. Another pattern is characterized by marked apathy and indifference. Both of these patterns may be associated with damage to the frontal lobes, and for this reason are sometimes referred to as 'frontal lobe syndromes'...The major personality change may be the development of suspiciousness or paranoid ideation....Mild cognitive impairment and irritability may be present....The degree of impairment is variable. Despite relatively intact cognitive function, poor judgment may lead to such difficulties that the person may require constant supervision or even custodial care....Socially unacceptable behavior may lead to social ostracism or legal difficulties. Impulsive or explosive behavior may be dangerous to the individual and to others....Organic Personality Syndrome is usually due to structural damage to the brain. The most common causes are neoplasms (for example, meningiomas pressing on the frontal lobes, head trauma (including the post-

concussion syndrome), and vascular disease."

(App. 1).

Dr. Brad Fisher, Ph.D., a specialist in forensic clinical psychology who wrote his dissertation on the prediction of dangerous behavior, reviewed the records, interviewed Mr. Sawyer, and administered a series of neuropsychological tests. The testing revealed "considerable indicators of both neurological dysfunction (brain damage) and a mild level of mental retardation." Dr. Fisher concluded that:

> the[] findings of neurological dysfunction may well be related to connected behavioral dysfunction, including the possibility of poor judgment under stress and impulsive acting out behaviors, especially at those times. Indicators of brain damage in clients reporting uncontrollable violent rage behavior are often indicative of possible frontal lobe dysfunction.

(App. 2).

Dr. Orrin Devinsky, Chief of the Department of Neurology at the Hospital for Joint Diseases of New York University and Associate Professor of Neurology, also reviewed school records, records of mental health treatment in City of Memphis Hospital and Western Mental Health Institute, and other available medical records. He then obtained a history and performed a neurological examination. The results of the neurological examination indicated "global cognitive impairment and specifically point[ed] to evidence of prefrontal dysfunction." , (App. 2).

Further, more sophisticated testing, by way of Magnetic Resonance Imaging (MRI), revealed "a small punctate focus of increased proton density in the subcortical white matter of the

medial left frontal lobe." In reporting the results of the MRI, Dr. Devinsky concluded:

> As I stated in my original report the type of neurological deficits Mr. Sawyer has are characteristic of frontal lobe injury. The MRI provides supporting evidence that he has brain damage. These abnormalities are a marker for other brain abnormalities that are at a microscopic or functional level, and severely compromise his intellectual, emotional and behavioral functions.

In reaching their conclusions and explaining them, all three doctors mention early evidence of retardation, severe head injuries (with loss of consciousness), Mr. Sawyer's violent home environment, his early manifestation of behavioral disturbances (hyper-aggressive and hyper-sexual impulses) resulting in hospitalization, and the excessive drinking which began about a year before he committed murder.

Each doctor explains the relevance of Mr. Sawyer's neurological dysfunction to the murder and subsequent legal proceedings:

> Behavioral Symptoms. The impulsive aspect of Robert Sawyer's behavior in response to emotional interpersonal situations or to his own aggressive and/or sexual mood occurs with minimal, if any, intellectual reflection. Any experiences such as moral culpability, consideration for others involved or any understanding of the generalized significance of his behavior is lacking, regardless of outward appearances. His behavior in response to emotional signals is akin to a reflex arc having perhaps ritualistic but not truly rational significance.
>
> Cognitive Symptoms. Robert Sawyer's deficit in using or comprehending abstract words and symbols severely limits his capacity to understand general legal concepts and their particular applicability. Therefore, dialogue with counsel regarding defense strategies, plea bargaining, etc., could not be understood beyond some limited, concrete sign value

> which he would describe. For example, he insisted during my interview that "evidence" was "something lawyers used against you." When asked if evidence could be used in one's behalf, he answered, "No, only against you." When asked to define evidence, he said, "It's what lawyers put on a yellow pad like the one you're using." No more adequate definition could be elicited.

(App. 1).

> At the time the crime was committed, Mr. Sawyer's brain damage, specifically in the prefrontal areas, impaired his ability to control aggression and to comprehend the consequences of his actions. A long night of heavy drinking immediately preceding the murder intensified the neurologic impairment. Mr. Sawyer reacted violently and inappropriately when confronted with what he believed to be evidence that two young children had been drugged. Uninhibited, his aggressive impulses dominated his behavior for a period of time during which he could not comprehend that the increasingly destructive physical abuse of the victim would lead to her death. Brain damage, aggravated by intoxication, impaired his capacity both to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

(App. 2).

> When these handicaps [neurological dysfunction and mental retardation related to connected behavioral dysfunction] are combined with the self administration of massive amounts of alcohol, it is probable that whatever neurological deficits are present will be exacerbated at the time of the crime because of the data suggesting large levels of alcohol ingestion without nutrition, and consequently may have resulted in a psychotic breakdown at that point (i.e., not a chronic condition, but one caused by the combination of neurological handicap and alcohol ingestion without nutrition). Psychosis can best be explained in this context as a condition where a person is not in touch with reality and may have severe limits in cognitive and judgmental functions such as the ability to differentiate between right and wrong.

(App. 3).

Mr. Sawyer's multiple impairments, resulting from his cruel treatment as an innocent child, paint a picture of human frailty and deprivation which in turn casts a different light upon what have been repeatedly described as an inexplicable acts of brutality. See, e.g., Sawyer v. Smith, 110 S.Ct. 2822, 2825 (1990) ("brutalities" committed "for reasons that are not clear"). Mr. Sawyer's jury was stripped of its ability to make an accurate decision as to the appropriate sentence in his case when trial counsel failed to conduct the most rudimentary investigation of readily accessible evidence which would have mitigated against death.

REASONS FOR GRANTING THE WRIT

A. Introduction

In Smith v. Murray, 477 U.S. 527 (1986), the Court extended to the sentencing phase of a capital trial the "fundamental miscarriage of justice" exception to cause and prejudice doctrine set forth in Murray v. Carrier, 477 U.S. 478 (1986). Stating, "that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense," id. at 537-38, the Court declined to address the question of what constitutes a miscarriage of justice in that context. In Dugger v. Adams, 489 U.S. 401 (1989), and, again in

McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454 (1991),[9] the Court refused to resolve the question. The result of the Court's refusal has been confusion and conflict -- four lower courts have provided four different answers most of which are unfaithful to this Court's indications of what the proper application of a miscarriage of justice in the sentencing context should be. The question has gone unanswered long enough. The conflict needs to be resolved now because the lower courts are in desperate need of this Court's guidance. See, Supreme Court Rules, Rule 10.1(a).

It cannot be denied that the proper application of the "innocence of death" standard is of exceptional importance. Many cases currently pending in the lower courts, and many cases to follow,[10] may turn on the resolution of the differing standards of the four circuits and the soon-to-be-developed standards in the other circuits.

Further, this compelling case must be reviewed. It is the

---

[9] On October 10, 1989, this Court granted certiorari in Selvage v. Lynaugh, 494 U.S. 108 (1990) limited to the following question:

> At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in Penry v. Lynaugh, 106 L.Ed.2d 256 (1989); and if not, would the application of a procedural bar to this claim result in a "'fundamental miscarriage of justice'" Smith v. Murray, 477 U.S. 527 (1986).

The Court remanded the case to the lower court to consider the first part of the question and did not reach the second part of the question. Id.

[10] For example, in Selvage v. Lynaugh, No. 88-2278 (5th Cir.) oral argument was held on October 1, 1991. A separate panel for Mr. Sawyer's is struggling with the issue of whether or not the eligibility test set forth in Sawyer v. Whitley, supra can be applied to Texas' sentencing scheme.

rare and exceptional case. The facts presented show that the state practiced a no-holds-barred prosecution violating the most fundamental fairness of a fact-finding process and several of Mr. Sawyer's constitutional guarantees. The reasons for Mr. Sawyer's involvement in the crime are now very clear and are directly linked to his organic brain damage, mental retardation and history of extreme physical and emotional abuse. The facts show that the jury would have voted life had (i) they known of the frailties of his life, including his four prior commitments to mental institutions, or (ii) had his young and inexperienced trial counsel performed effectively, competently and ethically. But for trial counsel's gross errors, Mr. Sawyer would not be before the Court today.

B. The Conflict

Since this Court's acknowledgment in Smith and Dugger that the miscarriage of justice exception applies to the penalty phase of a capital trial, the following cases have proposed standards: Deutscher v. Whitley, 1991 WL 204454 (9th Cir. October 15, 1991); Sawyer v. Whitley, supra; Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) (en banc); and Stokes v. Armontrout, 893 F.2d 152 (8th Cir. 1989). While Mr. Sawyer is the first litigant on this issue to request a ruling from this Court, two other litigants may be requesting certiorari review in the next two months. The Petitioner in Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) (en banc) is scheduled to file a certiorari

application on December 13, 1991.[11] The respondent in Deutscher v. Whitley, supra may file a certiorari application soon.[12]

As shown below, the Court has provided guidance to the lower courts in Smith, supra, Dugger, supra, and Kuhlmann v. Wilson, 477 U.S. 436 (1986), by articulating principles which assure fairness in the fact finding process. Those principles have been ignored by the Fifth and Eleventh Circuits, in articulating proposed standards for "innocence of death" exception, and have formed the basis for the Ninth Circuit proposed standard for the exception.

The latest pronouncement is Deutscher v. Whitley, 1991 WL 204454 (9th Cir. October 15, 1991). There, the court was faced with a claim in a successor petition strikingly similar to Mr. Sawyer's, that is, was trial counsel ineffective for failing to present compelling mitigating evidence of childhood abuse, organic brain damage, prior diagnosis of schizophrenia and commitments to mental institutions. Because the claim was

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[11] The Eleventh Circuit has stayed the mandate in Johnson, supra, until December 13, 1991 pending application for certiorari under Rule 41 of the Rules of the United States Court of Appeals for the Eleventh Circuit, which states, in part, "Ordinarily [a motion for a stay of the mandate] will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court...."

[12] The death-sentenced prisoner in Deutscher was granted relief on the same successor claim with strikingly similar facts. If Mr. Sawyer's case were in the Ninth Circuit he would not be before the Court today. Under an accuracy-seeking standard of review, Mr. Sawyer would have been granted relief. See, infra. It is inequitable and wholly unjust that these two cases have different results.

subject to abuse of the writ, the court noted that under the fundamental miscarriage of justice doctrine the writ must issue "if, as a consequence of the constitutional error, (1) the sentencing body never considered evidence critical to the exercise of its discretion and (2) it is more probable than not that the death penalty would not have been imposed had the evidence been considered." Id. at 3. Drawing on this Court's decisions in Dugger v. Adams, supra and Smith v. Murray, supra, and noting that the doctrine of abuse of the writ is "based on the principles of equity," the court outlined the appropriate standard as follows:

> To establish a fundamental miscarriage of justice at sentencing, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination.... This requires a showing that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for the constitutional error, the sentence of death would not have been imposed.

Id. at 3 (citation omitted) (the dissenting judge agreed that the standard is proper, while disagreeing with its application).

In Stokes, supra, the court held that the fundamental miscarriage of justice "exception will be available [for penalty phase claims] 'if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.'" Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1990) (quoting Smith v. Armontrout, 888 F.2d 545 (8th Cir. 1989)).

Johnson, supra, produced three proposed standards with a

slim six member majority holding:

> The sentenced defendant must demonstrate not merely that the error affected the sentencing outcome, but that the error resulted in a sentencing outcome for which the defendant is not eligible by virtue of his conduct....That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty.[13] Id. at 1183 (emphasis in original).

The Johnson majority justified its eligibility standard on the ground that "a court lacks objective criteria by which to divine that it is 'factually incorrect' to sentence a particular death-eligible defendant to death or life instead. So long as the could have imposed the death penalty, there can be no 'correct' or 'incorrect' sentencing outcome." Id. at 1184. Under the Johnson view, a court is incapable of resolving claims of ineffective assistance of counsel at the sentencing phase.

Judge Anderson, joined by three other judges, argued vigorously in dissent that the majority's proposed standard "is inconsistent with the guidance" set forth by this Court. Drawing directly from Smith, Dugger, and Kuhlmann, the four dissenters

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[13] The court's eligibility test is premised on a faulty canvas of developments in the law since Furman v. Georgia, which led the majority to conclude that this Court has travelled a "jurisprudential circle." Id. at 1179. This characterization results from the court's reasoning that Furman held unconstitutional unlimited discretion in capital sentencing and Lockett v. Ohio, 438 U.S. 586 (1979) "did not merely tolerate discretion, but mandated it!" Id. at 1180. Next the court makes its most blatant leap in logic, stating "[t]he Court dropped the other shoe" in Barclay v. Florida 463 U.S. 939 (1983), and Zant v. Stephens 462 U.S. 862 (1983), by taking the law back to the pre-Furman era when it decided that juries have unfettered discretion to consider anything in aggravation. Id.

proposed a standard that is "reserved for the extraordinary case," Id. at 1199, and that tests the reliability and accuracy of the sentence. Under this standard absent a showing of cause and prejudice, abuse of the writ may be excused in a sentencing context "where the alleged constitutional error has resulted in a factually inaccurate sentencing profile, and the inaccuracies are so significant that the result would have been different." Id. at 1200. (emphasis in original). The test demands that the sentencing profile before the triers of fact was true and correct, and that but for the error, the outcome would have been different.

A third proposed test was outlined by Chief Judge Tjoflat, who also found the majority's proposed test to be "unfaithful" to this Court's precedent but for different reasons. Id. at 1187. While endorsing the "eligibility" concept, the Chief Judge proposed a test that takes into consideration federal and state law. Id. at 1191.

The Fifth Circuit's proposed test in this case ignores this Court's precedent, misapplies and misconstrues precedent, and is unable to correct fundamental miscarriages of justice. The panel's proposed test requires

> the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty. That is, a petitioner is not actually innocent of the death penalty unless he demonstrates, under all the evidence that was and arguable should have been presented, that the jury would not have been authorized to sentence him

to death.

Sawyer, slip op. at (emphasis added). The test is simply one of "eligibility," and in Louisiana and most other states, it means that the claim(s) in the successive petition must implicate the aggravating factor(s) found by the jury in the sentencing phase. The panel's decision does not take into consideration core principles of the eighth amendment and this Court's clear signals that accuracy, reliability, and appropriateness of the sentencing determination are fundamental. In announcing this test, the court misapplied Bullington v. Missouri,[14] 451 U.S. 430 (1981), and Jackson v. Virginia, 443 U.S. 307 (1979)[15]. The panel's opinion also ignores the clear implication of this Court's precedent that the "innocence of death" exception must be a separate and distinct standard from the "innocence of guilt" standard.

C. Accuracy, Not Eligibility, Must Provide the Basis For

---

[14] The panel's statement that Smith is premised on Bullington's distinction between a death sentence and other sentences, at 13-14, completely misconstrues Bullington. "The 'case' to which the Court referred in Bullington was the prosecution's case that the defendant deserved the death penalty." Poland v. Arizona, 476 U.S. 147, 153 n.3 (1986). See also, Arizona v. Rumsey, 467 U.S. 203, 209 (1984).

[15] The panel's incorporation of Jackson's sufficiency of the evidence test is unfounded. This Court has never referred to Jackson as the "foundation of the Kuhlmann test." Sawyer, slip op. at 17. To the contrary, Jackson's sufficiency test focuses solely on the prosecution's case and is wholly inconsistent with the Kuhlmann and McCleskey mandate that a petitioner make a colorable showing of innocence by considering all probative evidence. Kuhlmann's standard inquires whether the trier of fact would have entertained a reasonable probability as to guilt, not whether elements of a crime or penalty could have been found beyond a reasonable doubt.

The Appropriate Standard.

The eligibility test will not allow courts to correct gross fundamental miscarriages of justice. Justice cannot be served by using this standard. As in this case, a petitioner can show that his counsel did absolutely nothing to prepare for the penalty phase, but merely parroted false information in a one page closing argument when he could have presented the compelling mitigation outlined above, the facts of the claim are ignored under the Fifth Circuit's proposed standard. Petitioners, like Mr. Sawyer, who can demonstrate a total breakdown of the integrity of the fact finding process will be ensnared in a procedural death trap. However, the petitioner in Deutscher was granted relief, a reversal of his death sentence, based upon counsel's failure to present mitigation evidence which is quite similar to Mr. Sawyer's. See, Deutscher, supra, 1991 WL 204454 at 3 (mitigating factors forming the basis of the court's opinion). The simple, and disturbing, fact is that under an equitable, accuracy-seeking standard, Mr. Sawyer would find himself in the same situation as Mr. Deutscher. If Mr. Sawyer's case was in the Eleventh Circuit, rather than the Fifth Circuit, he would not be under a sentence of death.

In Kuhlmann, supra, the Court ruled that lower courts must "entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Id. at 454. The petitioner must "show a fair probability in light of all [probative] evidence...[that]

the trier of fact would have entertained a reasonable doubt as to guilt." Id. at 454, n.17 (quotations and citations omitted).

In Smith, supra, the Court stated that the fundamental miscarriage of justice exception would apply where there is a "substantial claim that the alleged error undermined the accuracy of the...sentencing determination." Id. at 359. The question at issue was left unanswered because the erroneously admitted evidence (i) was not "false or in any way misleading", (ii) did not have the effect of "foreclosing meaningful exploration of psychiatric defenses," (iii) did not "preclude[] the development of true facts [or] result[] in the admission of false ones", or (iv) did not "serve to pervert the jury's deliberation concerning the ultimate question whether in fact petitioner constituted a continuing threat to society." Id. at 538.

In Dugger, supra, the Court again emphasized that the accuracy of the jury's verdict that death is the appropriate punishment is suspect when false evidence is admitted or accurate evidence is not admitted. At issue was whether the Caldwell error in that case asserted in a second habeas petition could be reviewed on the merits absent a showing of cause and prejudice. The dissent argued that "since 'the very essence of the sentencing determination has been unconstitutionally undermined,' the standard for showing a fundamental miscarriage of justice necessarily is satisfied." Id. at 417, n. 6. The majority rejected this overbroad application, stating, "Demonstrating that an error is by its nature the kind of error that might have

affected the accuracy of a death sentence" is not whether the error did in fact undermine the accuracy, or put another way, whether the petitioner can demonstrate whether he is actually innocent of the death sentence. Id. (emphasis in original).

This precedent makes clear that the exception is reserved for errors that actually undermine and destroy the fairness of the fact finding proceeding because the error prevents an accurate, reliable and individualized sentencing proceeding. It is the rare and extreme case, such as this one, where it can be shown that the error allowed for the presentation of false and misleading evidence and precluded the development of true and correct evidence which perverted the sentencers' decision.[16] The eligibility test does not comport with Kuhlmann's requirement that all probative evidence of the alleged claim be considered, with Smith's focus on whether the facts and the deliberations were perverted in order to determine whether the sentencing determination is accurate, or with Adams's admonition that the exception is limited to a showing that an error is fact-based and did in fact undermine the accuracy.

Further, the eligibility test is nothing more than the "colorable showing of factual innocence" of guilt set out in Kuhlmann. In Louisiana, eligibility for death is established in

[16] On November 12, 1991, Mr. Sawyer appeared before the Louisiana Board of Pardons and finally was able to have a forum consider his mitigation. By a 3-2 vote, the Board recommended a commutation sentence to life. The Governor of Louisiana must now except or reject the recommendation.

the guilt or innocence phase. Lowenfield v. Phelps, 484 U.S. 231 (1988). Implicating the "eligibility" factors necessarily implicates the guilt verdict. Applying the proposed standard means that once a person can show that the sole aggravating factor found at sentencing, for example, armed robbery, was untrue, his guilt of first degree murder must fall. See, Lowenfield, supra.

The Ninth Circuit has issued the only standard that can, correct fundamental miscarriages of justice and is consistent with this Court's precedent. In the wake of Deutscher v. Whitley, supra, the State of Nevada may very well petition this Court shortly, as may Mr. Johnson of Johnson v. Singletary, supra. Justice will not be served by allowing Mr. Sawyer's case to pass through this Court unanswered when it is clear that the sentencing determination would have been different had the errors not occurred. This is the extraordinary case demanding review of an exceptionally important question.

CONCLUSION

Petitioner, Robert Wayne Sawyer, respectfully requests that this Court grant the writ of certiorari.

Respectfully submitted:

* NICHOLAS J. TRENTICOSTA
SARAH OTTINGER
R. NEAL WALKER
Loyola Death Penalty Resource Center
210 Baronne Street, Suite 608
New Orleans, Louisiana 70112
(504) 522-0578

By:
NICHOLAS J. TRENTICOSTA

Counsel for
Robert Wayne Sawyer

* Counsel of Record

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

CAPITAL CASE
EXECUTION DATE:
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ORIGINAL

ROBERT WAYNE SAWYER,
PETITIONER

VERSUS

JOHN P. WHITNEY, WARDEN, LOUISIANA STATE PENITENTIARY
RESPONDENT

* * * * *

STATE OF LOUISIANA'S RESPONSE IN OPPOSITION TO STAY OF EXECUTION, AND WRIT OF CERTIORARI OF SECOND WRIT OF HABEAS CORPUS

* * * * *

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
BAR ROLL #9679
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
GRETNA, LOUISIANA 70053
(504) 368-1020

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

ROBERT SAWYER,
PETITIONER-APPELLANT

NICHOLAS J. TRENTICOSTA

ACTING DIRECTOR
LOYOLA DEATH PENALTY RESOURCE CENTER,
AND COUNSEL FOR PETITIONER

JOHN P. WHITLEY,
WARDEN,
LOUISIANA STATE PENITENTIARY

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL FOR THE STATE OF LOUISIANA

JOHN M. MAMOULIDES
DISTRICT ATTORNEY FOR JEFFERSON PARISH

DOROTHY SENDERGAST
Attorney of Record for
All Respondents

REASONS FOR NOT GRANTING WRIT

The issues in this case do not provide this Court with a basis for granting a writ of certiorari. The panel opinion from the Court of Appeal for the Fifth Circuit is consistent with the opinion from the Eleventh Circuit, Johnson v. Singletary, 938 Fd.2d 1166 (11 Cir. 1991) (en banc) and does not conflict with the opinions rendered by the Eighth Circuit, Stokes v. Armontrout, 893 Fd.2d 152 (8th Cir. 1990), and Ninth Circuit, Deutscher v. Whitley, 1991 Lexis 23717 (9 Cir. October 15, 1991), but merely limits the application of those opinions. The Fifth Circuit carefully developed a definition of "actual innocence of the death penalty" that a Petitioner is not actually innocent of the death penalty unless he demonstrates under all the evidence that was and arguably should have been presented that the jury would not have been authorized to sentence him to death. See, Sawyer v. Whitley, (slip opinion October 10, 1991, page 17.) In developing the sentencing phase test the court looked at Kuhlman v. Wilson, 106 S.Ct. 2616 (1986) in which the plurality focused on whether the Petitioner had shown a fair probability that, in light of all the evidence, the trier of fact would have entertained a reasonable doubt as to his guilt. Because Jackson v. Virginia was at the foundation of the Kulhman test, and carefully limited the role of court in conducting a sufficiency of evidence review so as not to impinge on the jury discretion, the Fifth Circuit limited its test of a claim of actual innocence of a capital sentence to only those facts which provide the predicate for the jury's authority to assess the death penalty.

This definition is not in conflict with the definition from the Eighth and Ninth Circuits but merely limits of their definition. The Eighth Circuit established that "in the penalty phase context, this exception will be available if the Federal Constitution error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment. Stokes v. Armontrout, supra. The Fifth Circuit definition does not conflict with the Eighth Circuit's but merely limits the inquiry, so as not to impinge on the discretion of the jury, to those facts that

would support the eligibility for the death penalty.

Furthermore, the definition does not conflict with the Ninth Circuit test which requires a showing that Constitutional error affected the sentencing process to such a degree that it is more probable than not that, but for Constitutional error, the sentence of death would not have been imposed. Deutscher v. Whitley, supra. The Fifth Circuit test merely limits this definition to those facts which are prerequisits under state or federal law to the imposition of the death penalty. Its definition does not conflict with the Eighth and Ninth Circuits but merely limits the inquiry to all the evidence that auguably should have been presented that would implicate eligibility for the death penalty such that the jury would not have been authorized to sentence the defendant to death.

The Fifth Circuit's test is evidently applicable to Texas as well a Mississippi within the Fifth Circuit because the court refused the request herein for a rehearing and a request for a rehearing en banc. Moreover, the Fifth Circuit's test is general enough to be applicable to an individual state as well as federal requirements for the imposition of a death penalty.

Petitioner's concern that the eligibility standard cannot correct the most egregious Constitutional violation is resolved by the application of the cause and prejudice analysis used in Wainwright v. Sykes and McClesky v. Zant. The actual innocence of the death penalty was developed as an extention of a coloral showing of actual innocence which would allow a Petitioner to bypass the procedural default rule in spite of an inability to show cause and prejudice for the default. It is clear from Petitioner's examples that these most egregious Constitutional violations would satisfy the cause and prejudice analysis.

This writ of certiori should be denied since it does not present this Court any grounds for a discretionary review, expecially on a second federal habeas petition.

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IN THE

SUPREME COURT OF THE UNITED STATES

* * * * *

ROBERT WAYNE SAWYER,
PETITIONER

VERSUS

JOHN P. WHITNEY, WARDEN, LA. STATE PENITENTIARY
RESPONDENT-APPELLEE

* * * * *

MAY IT PLEASE THE COURT:

STATE OF JURISDICTION

This writ arises out of the denial of a second habeas corpus petition filed in the United States Court of Appeals for the Fifth Circuit. This Honorable Court, therefore, has jurisdiction over the instant matter under 28 U.S.C.A. §2253.

ISSUES PRESENTED

1. Whether the United States Court of Appeal for the Fifth Circuit erred in rejecting Petitioner's claims as barred under 28 U.S.C.A. § 2254 9(b).

2. Whether Petitioner's claim regarding "actual innocence of the death penalty" is procedurally barred by Rule 9(b) because the issue and it's supporting claims were addressed and rejected by the State Court and the United States District Court in his first application; and because Petitioner omitted the claim from his first habeas corpus appeal to the United States Fifth Circuit, Court of Appeal.

3. Whether Petitioner has satisfied the "cause and prejudice" standard to escape the procedural bar under McCleskey v. Zant, 11 S.Ct. 1454 (1991).

4. Whether Petitioner demonstrated a "fundamental miscarriage of justice", or "actual innocence of the death penalty", that allows him to bypass the procedural bar.

5. Whether Petitioner could overcome by the introduction of his additional alleged "facts" his qualification for the death penalty under La. R.S. 14:24,

Principals, and Tison v. Arizona, 107 S.Ct. 1676 (1987).

STATEMENT OF THE CASE

I. Course of Proceedings Below

The state acknowledges the procedural history as recited by Petitioner.

II. Statement of the Facts

The following statement of facts is essentially as found in State v. Sawyer, 422 So.2d at 97, 98 (La. 1982) and the trial transcript.

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reason behind the events that followed are difficult to discern accurately from the

record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath because nobody wanted to look [at] her "funky whory ass" that way. When she resisted defendant kicked her in the back of the head with his shoes which had taps on the ends. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, which defendant actually left the bathroom to boil while Lane kept a watch over Arwood (a period during which he may have raped Arwood). When defendant returned to the bathroom they administered additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, with both of his feet while letting out a yell, causing her head to strike either the tub or the adjacent window sill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down onto the floor. While on the floor, defendant walked on her back and Lane kicked her in the ribs. Defendant then beat her with a belt as she lay on the floor. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell

of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and set the lighter fluid afire. Lane told Shano, as he and Sawyer laughed about it, that his penis had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. Shano, then heard Sawyer tell Lane, "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get."

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died. State v. Sawyer, supra at 97,98.

Petitioner initially pled not guilty and not guilty by reason of insanity but withdrew that plea and went to trial on a plea of not guilty with a defense of toxic psychosis. Before trial Petitioner filed a Motion To Appoint A Sanity Commission And To Order Medical Observation And

Test (R.E. A).[1] The two psychiatrists found that Petitioner was competent: That he understood the proceedings against him and that he could assist his counsel at trial. (R.E. B - Dr. De Viller's report and R.E. C - Dr. Arneson's report). Thereafter, Petitioner was found guilty of La.R.S. 14:30, First Degree Murder, and sentenced to death by a twelve person jury. He then began the appellate and post-conviction process based on the claims listed below. The aggravating factor in support of the conviction is aggravated arson; the aggravating factors in support of the death sentence are 1) engaged in perpetration of aggravated arson 2) committed in an especially heinous, atrocious or cruel manner.

Direct Appeal

Sawyer's direct appeal to the Louisiana Supreme Court addressed the following errors, although the Supreme Court reviews all errors and the sentence for excessiveness by considering if it was imposed under the influence of passion, prejudice or any other arbitrary factors:

1. Insufficient evidence to support the aggravated arson as an aggravating circumstance;
2. Insufficient evidence to support aggravated rape as an aggravating circumstance;
3. Introduction of evidence of prior conviction;
4. Introduction of prior indictment for Second Degree murder;
5. Excessive sentence because at least on aggravating circumstance not supported by the evidence.

[1]To assist the Court, the State will adopt the same abbreviations as established by petitioner: Record excerpts (R.E.__); Trial excerpts (Tr.E.__); Motion to Suppress (Mt.S.__)

Post Conviction Application

Sawyer's questions presented:

I. Violation of La. C.Cr. P. art. 512, that requires a counsel for a defendant charged with a capital offense to have been admitted to the bar for at least five years;

II. Ineffectiveness of counsel;

III. Denial of Constitutional right of Petitioner to decide whether or not to testify;

IV. Prosecutorial misconduct in the penalty phase closing argument;

V. Arbitrary factor infecting by prosecutor into jury deliberations by misleading them as to their role in imposing the death sentence;

VI. Failure of trial court to instruct that defendant is not required to testify;

VII. Trial Court's instruction at the guilt-innocence phase regarding the State's burden of proof beyond a reasonable doubt was in error;

VIII. Same as Claim VII;

IX. Trial court excused jurors who expressed only general opposition to the death penalty. (Witherspoon violation);

X. Violation of Eighth Amendment where imposition of the death sentence where one of the aggravating circumstances is not supported by the evidence;

XI. Inadmissable evidence introduced during capital sentencing hearing;

XII. Petitioner was denied a full and fair hearing in all previous state court proceedings (moot);

XIII. Death qualification of Petitioner's guilt phase jury was illegal and unconstitutional;

XIV. Comparative appellate review of Petitioner's sentence was constitutionally inadequate;

XV. Petitioner's sentence is excessive and disproportionate;

XVI. Petitioner's sentence is arbitrary and capricious;

XVII. Electrocution is a cruel and unusual means of punishment;

XVIII. Petitioner's sentence is invidiously discriminatory;

XIX. Capital Punishment is an excessive penalty;

XX. The cumulative effect of violations of Petitioner's rights is in itself a violation of Petitioner's constitutional rights.

A hearing was held in the state district court on July 12, 1985, after which these claims were denied with reasons.

Writ Of Habeas Corpus -- United States District Court

Sawyer's claims presented:

1. Improperly death qualified jury;

2. Attorney with less than 5 years violated Equal Protection and Due Process;

3. Ineffective assistance of counsel;

   a) Was admitted to practice for less than five years;

   b) Objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;

   c) Failed to object during voir dire to prosecutor's reference to evidentiary facts that were not later established at trial;

   d) Failed to conduct a meaningful voir dire;

   e) Failed to discuss with Petitioner the nature of the defense;

   f) Failed to allow Petitioner to testify during the guilt phase of the trial;

   g) Failed to adequately prepare defense witnesses for trial;

   h) Failed to call an expert that would have been able to give an opinion as to the effect of alcohol on Petitioner;

   i) Did not present a closing argument during the guilt phase of the trial;

   j) Presented an unprepared defense during the penalty phase of trial;

   k) Failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;

   l) Failed to object to erroneous instructions given the jury by the court during

guilt and penalty phase of trial; and

m) Made an inadequate closing argument during penalty phase of trial.

4. Prosecutorial misconduct at penalty phase;

5. Improper prosecutorial argument;

6. Deprivation of right to testify;

7. Failure of trial court to properly instruct jury at guilt phase of trial;

8. Unconstitutional jury instruction on burden of proof at guilt phase;

9. Unconstitutional jury instruction at guilt phase regarding specific intent;

10. Improper jury excusal;

11. Arbitrary factor introduced at sentencing phase by unsupported aggravating circumstance;

12. Inadmissible evidence at sentencing introduced arbitrary factor;

13. Petitioner's sentence is excessive and disproportionate;

14. Petitioner's sentence is arbitrary and capricious;

15. Electrocution is a cruel and unusual means of punishment;

16. Petitioner's sentence is invidiously discriminatory;

17. Capital punishment is an excessive penalty;

18. The cumulative effect of violations of Petitioner's rights is in itself a violation of Petitioner's constitutional rights.

The District court denied all of petitioner's claims with written reasons

Federal Habeas – United States Fifth Circuit

1. Attorney appointed with less than five years admission to bar violated equal protection and Due Process;

2. Ineffective assistance of counsel

a. failed to ask jurors about their attitudes towards the death penalty during

voir dire;

b. objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well the penalty for manslaughter at the guilt phase;

c. failed to object to several inadmissible, inflammatory remarks by the prosecutor;

d. produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as the basis for the defense to negate the specific intent required for first degree murder;

e. failed to make closing argument at the guilt phase of trial; and

f. failed to prepare a competent penalty phase presentation.

3. Improper prosecutorial remarks at the sentencing phase under Caldwell.

After a divided panel of the U.S. Fifth Circuit denied these claims an en banc court affirmed the panel opinion.

Writ Of Certiorari To The United States Supreme Court

1. Whether Petitioner was procedurally barred from application of the rule announced in Caldwell v. Mississippi, by Teague v. Lane, 109 S.Ct. 1060 (1989) and Penry v. Lynaugh.

2. Whether Petitioner's remarks, if not barred by Teague-Penry were improper under Caldwell.

The Court determined that Petitioner's claim was procedurally barred and affirmed the conviction and sentence by opinion on June 21, 1990.

Charles Lane was tried by a different jury, found guilty of first degree murder and sentenced to life imprisonment. Charles Lane had no prior criminal history other than a DWI from the State of Florida. State v. Lane, 414 So.2d. 1223 (La. 1982). Sawyer had a prior conviction for involuntary manslaughter of a four year old child in Arkansas and was sentenced to 3 years in

prison for that crime.

SUMMARY OF ARGUMENT

The State opposes the consideration of the claim "actual innocence of the death penalty" as an abuse of the writ under 28 U.S.C.A. §2254 9(b) and McCleskey v. Zant. The claim known as "actual innocence of the death penalty" is a new label for well established jurisprudence. If the new label means that an exception is available if the federal Constitutional error alleged probably resulted in a verdict of death against one who the jury would otherwise have sentenced to life, it is basically a proportionality review that was required by Furman v. Georgia, 925 S.Ct. 2726 (1972) and Woodson v. North Carolina, 96 S.Ct. 2978 (1976). The Louisiana Supreme Court did perform a proportionality review and thoroughly discussed the aggravating and mitigating circumstances and whether the death penalty was an appropriate sentence for this particular defendant under the facts and circumstances of this crime. This issue was never presented in the first federal habeas petition and should now be barred as an abuse of the writ.

If the new label is interpreted such that defendant's claim to innocence in the sentencing context affects his legal eligibility to receive the death penalty then it is a sufficiency of evidence review under Jackson v. Virginia, 99 S.Ct. 2781 (1979). Again the Louisiana Supreme Court thoroughly reviewed the guilt and penalty phases for the sufficiency of evidence and affirmed the conviction and sentence. The issue of sufficiency of evidence was not presented on federal habeas corpus appeal and should here by procedurally barred as an abuse of the writ.

Nonetheless, if the facts are reviewed on the merits Petitioner's new information is merely supportive of prior claims or alleged facts that are based on hearsay, faded memories, and distorted information. Although the allegation incompetency was addressed at the trial level it was never reviewed by a state appellate court or the federal court. It remains a factual determination. Moreover, any application of Ake v. Oklahoma, 105 S.Ct. 2978 (1976) is barred by Teague-Penry

and Petitioner cannot avail himself of this new rule. Also the issue of incompetency to proceed at trial is barred by La.C.Cr.P. art. 930.4 as a repetitive application and was so held by the state trial court.

The claims of mental disease and neurological dysfunction without behavioral manifestations that would support these legal claims of insanity and/or incompetency add nothing new to Petitioner's facts. No new evidence of incompetency at the time of the trial has been submitted by Petitioner. The evaluations and conclusions of Petitioner's newest doctors add nothing to the determination of competency made in 1980. Moreover the jury heard the basic premises of these mental disease allegations in the form of his hospitalization, drug treatments, shock treatments, and commitments through the testimony of his sister, Ms. White.

In support of his claims Petitioner fabricates an immunity agreement for Cynthia Shano based on hearsay and an eleven year old memory. Furthermore, he misleads the court as to Wayne Shano's statements to the police as described in the police report. He also alleges a second can of lighter fluid which has never been mentioned in a prior petition. Instead Petitioner, in his prior federal court petition, talked of a silver cigarette case which was found in the trash on the day following the crime. Petitioner than tries to make a Brady issue from a letter which was written four months after the trial by an inmate acquaintance of Charles Lane to Cynthia Shano. Petitioner fabricates a claim by lifting a statement from the prosecutor's trial notes regarding an odor of alcohol on Shano and omits notifying the court that the note before that indicates that at no time was Cynthia Shano considered for prosecution. Petitioner's "facts" are not founded in reality but are presented to this Court as a distortion of the facts and Petitioner's counsel should be sanctioned under Rule 11 for misrepresenting facts to this Court.

Even if the alleged facts that Petitioner proposes would be admitted at a trial, the evidence was so overwhelming that defendant herein would still qualify for the death penalty under

Louisiana law of principals, R.S. 14:24, and under the federal jurisprudence of Tison v. Arizona, supra.

Because Petitioner failed to show cause and prejudice to escape the abuse of the writ and failed to demonstrate a miscarriage of justice such that he would be actually innocent of the death penalty his claim here should be denied as an abuse of the writ and the stay of execution vacated.

LAW AND ARGUMENT

I. **THE FIFTH CIRCUIT COURT OF APPEAL DID NOT ERR IN REJECTING PETITIONER'S CLAIMS AS BARRED UNDER RULE 9(b) BECAUSE THEY WERE ADDRESSED AND REJECTED BY THE STATE COURTS AND THE UNITED STATES FEDERAL COURTS IN SAWYER'S FIRST APPLICATIONS THERETO; AND BECAUSE HE OMITTED THE CLAIM, NOW KNOWN AS "ACTUAL INNOCENCE OF THE DEATH PENALTY", FROM HIS FIRST HABEAS CORPUS APPEAL TO THE UNITED STATES FIFTH CIRCUIT, COURT OF APPEAL.**

The State continues to oppose the consideration of the claims herein as an abuse of the writ under 28 U.S.C.A. §2254 9(b) and McCleskey v. Zant, supra. Petitioner's claim herein and the facts which support that claim were essentially reviewed and denied by the Louisiana Supreme Court on direct appeal as claims I, II, and IV, and in its sentencing review under Supreme Court Rule 12. State v. Sawyer, supra at 95 (La. 1982), reh. denied (Nov. 24, 1982). More developed issues were presented to the State District Court in the first post-conviction application as claims II, X, XI, XIV, XV, XVI, XVIII and XX. (R.E. D.) A review of Petitioner's claims presented to the Federal District Court by writ of habeas corpus reveals that he presented this claim and the facts supporting it as claim III, ineffective assistance of counsel, and claims X through XVIII. Thereafter, when Petitioner filed his appeal in the United States Fifth Circuit, he had three claims which did not include

constitutional attacks on the death penalty and only included six bases for the ineffective assistance of counsel.

The United States Supreme Court in Antone v. Dugger, 104 S.Ct. 962 (1984) (per curiam), stated that claims presented for the first time in a second federal petition constituted an abuse of the writ. That court further held that claims raised for the first time in a fourth federal habeas petition abused the writ because they "could have been raised" or "could have been developed" in the first federal habeas petition. Delo v. Stokes, 110 S.Ct. 1880 (1990). Furthermore, when a Petitioner raises grounds that are available but not relied upon in a prior petition it is an abuse of the writ. Kulhman v. Wilson, 106 S.Ct. 2616 (1986) (plurality opinion). Moreover, new arguments in a second petition that plainly could have been raised earlier constitute an abuse of the writ. Rose v. Lundy, 102 S.Ct. 1198 (1982) (plurality opinion).

Petitioner claims that he is actually innocent of the death penalty. This claim is based on alleged Constitutional errors which allegedly affected the determination of whether or not Sawyer received a sentence of death. "Actual innocence of the death penalty" could be interpreted in two ways:

1.) That after a reconsideration of the mitigating and aggravating circumstances the appropriate penalty for a particular defendant and his specific crime is life in prison instead of death;

2.) Or that because some element of the crime or all of the aggravating circumstances supporting the death penalty were not proved beyond a reasonable doubt as a matter of law, the defendant is ineligible for a sentence of death.

Although the label is new, "actual innocence of the death penalty", the concepts are not. In the first instance, when a court reviews mitigating and aggravating circumstances, the procedure

is merely a proportionality review. Such a review is performed by the Louisiana Supreme Court under its own Rule 12 and La.C.CR.P. art. 905.9[2]. A Proportionality review of mitigating and aggravating circumstances has been mandated by the United States Supreme Court since Furman v. Georgia, supra, and Woodson v. North Carolina, supra. In those cases it was determined that a death sentence had to be individualized by considering the circumstances of the offense together with the character and propensities of the offender. Because the Louisiana Supreme Court already reviewed the mitigating and aggravating circumstances and determined that this penalty was appropriate for Mr. Sawyer and his crime, and because this issue was presented to United States District Court but never fully developed, then omitted from the appeal to the United States Fifth Circuit, it is now an abuse of the writ to consider it in a second writ.

On the other hand, if the second interpretation of "actual innocence of the death penalty" is accepted then, in reality, what is performed is a sufficiency of the evidence review under Jackson v. Virginia, supra, to determine that there is sufficient evidence such that a rational trier of fact could have found beyond a reasonable doubt each and every element of the crime and the aggravating circumstances. A sufficiency of evidence review was also done by the Louisiana Supreme Court as well as presented to the United States District Court in undeveloped claims. These claims were omitted from the appeal to the United States Fifth Circuit and therefore cannot be considered now in a second habeas corpus petition as he is procedurally barred by abuse of the writ.

"Actual innocence of the death penalty" is a new label for well settled jurisprudence developed since Furman. The Louisiana Supreme Court automatically performs a proportionality

[2]La. C.Cr.P. art. 905.9 Review on Appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy Constitutional criteria for review. Added by Acts 1976, No. 694 §1.

review and a sufficiency of evidence review of all capital sentences pursuant to state law and its own Rule 12. Despite the exact meaning assigned to this new label it represents well settled jurisprudence.

Petitioner states no reasonable explanation for his failure to fully develop this claim and its factual basis in his first state post-conviction relief application and federal habeas corpus application. Nor does Petitioner explain his failure to present these claims to this court on appeal of his first federal habeas petition. If Petitioner failed to raise this claim and supporting facts on appeal in his first petition because of a deliberate choice it is an abuse of the writ. See Delo v. Stokes, supra. The Petitioner may also abuse the writ by failing to raise the claim by inexcusable neglect. McCleskey v. Zant, supra at 1468.

Regardless of Sawyer's reason for omitting the claim from his federal habeas appeal, he does not present any facts that could not have been discovered at an earlier date, nor does he present any acts which implicate that the prosecutor deliberately withheld evidence. The prior appellate counsel had access to open file discovery as did Sawyer's present counsel. What happened at the time of the federal writ is that the Caldwell issue was ripe and the appeal was trimmed to emphasize the application of Caldwell to Sawyer's trial. Such a strategy choice is not an objective factor external to the defense that impeded counsel's effort to raise the claim in state or federal court. See Murray v. Carrier, 106 S.Ct. 2639 (1986). The State has met it's burden of pleading abuse of the writ, noting with particularity and clarity Petitioner's prior writ history. Petitioner has not disproved abuse because he has failed to show cause for not raising the issues in prior applications.

A. **IF "THE ACTUAL INNOCENCE OF THE DEATH PENALTY" IS A PROPORTIONALITY REVIEW IN THE EIGHTH AMENDMENT CONTEXT, IT WAS ADDRESSED AND REJECTED BY THE LOUISIANA SUPREME COURT AND THE UNITED STATES DISTRICT COURT BUT NOT PRESENTED TO THE UNITED STATES FIFTH CIRCUIT, COURT OF APPEAL ON FIRST HABEAS WRIT.**

If the "actual innocence of the death penalty" is defined as in the Eighth Circuit's interpretation then it is basically a proportionality review in the Eighth Amendment context that reviews the mitigating and aggravating circumstances. The Eighth Circuit established that "in the penalty phase context, this exception will be available if the federal Constitutional error alleged probably resulted in a verdict of death against one who the jury would have otherwise have sentenced to life imprisonment." Stokes v. Armontrout, 893 F.2d, 152 (8th Cir. 1989).

The Louisiana Supreme Court thoroughly reviewed the penalty phase for sufficiency of evidence of statutory aggravating circumstances and maintained two of the three aggravating circumstances found by the jury: 1.) The offense was committed in an especially cruel, atrocious and heinous manner, 2.) That the offense was committed during the commission of aggravated arson. The court found that the evidence did support the existence of two aggravating circumstances. The court further reviewed the sentencing for passion, prejudice, or other arbitrary factors to decide the appropriateness of the death penalty for this particular crime and this particular murderer. The court further evaluated the sentence in terms of proportionality and excessiveness. It concluded that

> "The only thing which seemed clear from a review of the cases presented to Jefferson Parish jurors is that they appear to recommend death in relatively few cases and only in those of an egregious nature. Certainly this case fits that description. Never before has this court had presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here. After administering a savage beating, defendant sat comfortably listening to records,

> while his tormented victim lay dying before his eyes. Although defendant attempted to show that Lane was the principal aggressor, the jury obviously credited Ms. Shano account which placed primary emphasis on defendant's role in Ms. Arwood's excruciatingly painful and lengthy ordeal. The jury obviously believed that he was principally responsible for urging Lane to participate in killing a woman who was virtually a perfect stranger to Lane.
>
> Moreover, the superficial disparity between the sentences imposed on Lane and on defendant quickly disappears when one evaluates the culpability of the two men in this incident, as well as their individual backgrounds. Neither of the two juries, which separately heard the cases and made the recommendations acted unreasonably. Two participants in the same murder can easily be viewed very differently for penalty purposes." State v. Sawyer, supra, at 105-106.

The state courts thoroughly reviewed Petitioner's trial and penalty phase and considered both the allegations regarding the mitigating and aggravating circumstances. The state court affirmed Petitioner's conviction and death sentence with thorough and well-developed reasons. Petitioner essentially failed to pursue a thorough review of the aggravating and mitigating circumstances of the penalty phase on federal habeas corpus. Petitioner should now be procedurally barred from presenting the claims since the supporting facts in this second federal habeas petition, which he inexcusably failed to raise in his first federal habeas appeal petition, do not support that petitioner is actually innocent of the conviction or death penalty. McCleskey v. Zant, supra. Petitioner's failure to establish cause and prejudice or a fundamental miscarriage of justice to escape this procedural bar will be developed further in this brief.

B. **IF THE "ACTUAL INNOCENCE OF THE DEATH PENALTY" IS A SUFFICIENCY OF EVIDENCE REVIEW IN THE EIGHTH AMENDMENT CONTEXT AS DEFINED BY THE ELEVENTH CIRCUIT, IT WAS ADDRESSED AND REJECTED BY THE LOUISIANA SUPREME COURT AND THE UNITED STATES DISTRICT COURT BUT NOT PRESENTED TO THE UNITED STATES FIFTH CIRCUIT, COURT OF APPEAL ON FIRST HABEAS WRIT.**

The Eleventh Circuit determined that a Petitioner may make a colorable showing that he

is actually innocent of the death penalty by presenting evidence that an alleged Constitutional error implicates all of the aggravating factors to be present by the sentencing body. That is, but for the alleged Constitutional error, the sentencing body could not have found any aggravating factors and thus Petitioner was ineligible for the death penalty. Johnson v. Singletary, (1991 WL 135998) (11th Cir. 1991). Basically the definition proposed by the 11th Circuit is a Jackson v. Virginia[3] sufficiency of evidence review of the penalty phase of the trial. In Louisiana, the class of persons eligible for the death penalty is narrowed at the definitional phase. A grand jury indictment can only be rendered for a violation of La. R.S. 14:30 if the facts of the case will initially qualify the defendant under the elements of the crime established therein. Homicides which do not qualify under R.S. 14:30 are classified as second degree murder, manslaughter, etc. In order to convict a defendant of R.S. 14:30, the state must prove beyond a reasonable doubt at least one of the aggravating circumstances listed in the definition of that crime. At the penalty phase the state is required to prove beyond a reasonable doubt one of the aggravating circumstances as listed in L.C.Cr.P. art. 905.4. But, once having been convicted of R.S. 14:30, the prosecutor need only reintroduce all the facts and evidence elicited at the guilt-innocence phase of the trial to satisfy this particular requirement. The prosecutor is free to offer any additional evidence that would support any of the other aggravating circumstances. The jury is instructed to consider "as opposed to weigh" the aggravating and mitigating circumstances to determine the appropriate sentence of life or death. La.C.C.P. art. 905.3. Thus, in Louisiana, a sufficiency of evidence review of the penalty phase would require that all aggravating circumstances that were found by the jury be reviewed. In order to find Petitioner innocent of the death penalty all aggravating circumstances found by the jury would have to be determined defective.

The Louisiana Supreme Court reviewed the death sentence as required by Supreme Court

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[3]Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), 61 L.Ed.2d 560

Rule 28: (a) Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and (b) Whether the sentence is proportionate to the penalty in similar cases, considering both the crime and the defendant. Additionally, the court reviewed the sufficiency of evidence of statutory aggravating circumstances because La.C.C.P. art. 905.3 requires that the jury find beyond a reasonable doubt the existence of at least one of the statutory aggravating circumstances listed in the code. After a thorough review of the trial facts and the penalty phase evidence the court affirmed Sawyer's death sentence.

The Louisiana Supreme Court again thoroughly reviewed the penalty phase at the direction of the United States Supreme Court in light of Zant v. Stephens, 103 S.Ct. 2733 (1983). Sawyer v. State, 442 So.2d 1136 (La. 1983).

The State District court in response to Petitioner's application for post-conviction relief rejected his claims after studying the records, transcripts, affidavits and stipulations.c

II. SINCE THE STATE HAS PLED ABUSE OF THE WRIT WITH CLARITY AND PARTICULARITY BY NOTING SAWYER'S PRIOR WRIT HISTORY AND IDENTIFYING THE CLAIMS THAT APPEAR FOR THE FIRST TIME AND THE CLAIMS THAT ARE REPETITIVE, THE BURDEN TO DISPROVE ABUSE UPON A SHOWING OF CAUSE AND PREJUDICE THEN BECOMES PETITIONER'S UNDER WAINWRIGHT V. SYKES.

The same cause and prejudice analysis used for procedural defaults, Wainwright v. Sykes, 97 S.Ct. 2497 (1977), was adopted for cases regarding an abuse of the writ inquiry in McClesky v. Zant, supra. In order to excuse his failure to raise the claim earlier, Petitioner must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in procedural default decisions. McClesky v. Zant, supra.

The cause standard require the Petitioner to show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court. Murray v. Carrier, supra. The

court in McClesky applied the definition of objective factors that constitute cause to address a claim in a procedural default case to claims in an abuse of the writ case: interference by officials, the factual or legal basis for a claim was not reasonably available to counsel and ineffective assistance of counsel.

Petitioner's claim herein is a mixture of a successive petition and a failure to raise the claim earlier. The claim of actual innocence of the death penalty was given only a cursory treatment by the Petitioner in his first federal habeas petition to the United States District Court. It was totally eliminated from his first habeas corpus petition to the United States Fifth Circuit. But some of the factual basis for this claim were presented to the federal courts in the form of ineffective assistance of counsel. Other constitutional attacks on the death penalty and sentencing phase were totally eliminated from the habeas petition to the Fifth Circuit except for the prosecutorial remarks at closing argument. Petitioner did address the failure to prepare a competent penalty phase and to present defense experts on the subjects of intoxication and toxic psychosis in the form of ineffective assistance of counsel. thus these claims are a mixture of successive and new claims. The claim incompetency to stand trial was never presented to the state of federal courts and represents a new claim which could have been addressed at an earlier time.

A. PETITIONER HAS NOT ESTABLISHED CAUSE TO EXCUSE HIS ABUSE OF THE WRIT BY ESTABLISHING INTERFERENCE BY OFFICIALS.

Petitioner has failed to establish a factual basis for cause for having omitted these claims from his petition. There was no cause as a result of interference by officials. The state does not have an agreement with Ms. Shano regarding her testimony. There is no allegation that the state ever impeded any investigator or defense counsel from questioning the affiant who appear herein claiming they perceived that Ms. Shano had an agreement with the state. Furthermore, there is no evidence that any state official prevented an interview with Diane Thibodeaux at an earlier time.

It is difficult to address the second can of lighter fluid since there is no evidence that there was in fact a second can of lighter fluid. Suddenly in the appeal to this court counsel has changed his allegations regarding the silver cigarette case made in the First Supplemental and Amended Petition, (p.4), into a second can of lighter fluid. The odor of alcohol (R.E. N) accusation clearly has no relevance since the testimony supported the fact that Robert Sawyer, Charles Lane and Cynthia Shano had been out drinking that night. Although Cynthia Shano testified that she did not drink, the evidence established that additional alcohol was brought back into the house when they returned from being out all night. After considering the amount of alcohol consumed it would be normal that an alcohol odor would permeate the residence. Moreover Ms. Shano was questioned at the trial about her alcohol consumption and that testimony obviates the claim herein. Furthermore, the state could not conceal before trial a letter from an inmate to Ms. Shano dated January 27, 1981, when the crime occurred in 1979 and the trial took place in September, 1980. Counsel for Petitioner on post-conviction relief had benefit of open file discovery. The letters were contained in the file and they had an opportunity to review and evaluate these letters according to the affidavit by the Assistant District Attorney William C. Credo. (R.E.K.)

In regard to the availability of the factual or legal basis for these claims, all information was available to counsel since the crime occurred except those items that have been manufactured by counsel. i.e., immunity agreement, Wayne Shano's statement, second can of lighter fluid. Sawyer has not presented facts to establish cause for his failure to investigate these claims and present them in his first petition. Moreover, counsel's proposed "facts" are a distortion of hearsay, a manipulation and manufacturing of evidence, and a presentation of half truths that have burdened the court and state.

B. MR. SAWYER WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, A DETERMINATION MADE BY ALL STATE AND FEDERAL COURTS THAT REVIEWED THIS CASE.

Ineffective assistance of counsel does provide cause for Petitioner to escape the application of abuse of the writ. Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Murray v. Carrier, supra at 2644-45. The issue of ineffective assistance of trial counsel has been addressed by all courts and denied. The Petitioner has never addressed a claim of ineffective assistance of appellate counsel.

Initially, Sawyer presented a litany of complaints in support of his ineffective assistance of counsel claim which included Counsel Weidner's alleged failure to present specific information regarding the 1966 hospitalization, to secure his own expert witnesses in the medical field and to properly prepare the penalty phase at trial.

In the analysis for ineffective assistance of counsel under Strickland v. Washington, 104 S.Ct. 2052 (1984), the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland requires that the defendant affirmatively prove prejudice. Id. Sawyer in this instance fails to demonstrate prejudice by the lack of specific information regarding his hospitalization in 1966, and how that information would have effected the outcome at trial. In fact, Sawyer admitted to the Pardon Board that he worked as a riverboat pilot and crew member off and on in the intervening years until the 1979 offense. Had this information been presented to the jury it would have balanced any of the alleged mental defects. This jury had information regarding Sawyer's prior behavior, his low intelligence, his sociopathic personality (whether accurate or not), his institutionalization, shock treatments, and abusive childhood. Petitioner fails to demonstrate prejudice by the failure to

introduce evidence of the commitment in 1966,[4] and the drug medication (Exhibit E).

The Fifth Circuit panel, as well as the en banc court, concluded that Sawyer had failed to affirmatively demonstrate prejudice from the allegedly deficient actions of counsel and that his ineffective assistance claim must fail. In his reasons for denying post conviction relief, the state trial judge said that Mr. Weidner's decision in not calling more than three character witnesses was probably strategy choice inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in Larsen v. Maggio, 736 F.2d 215, 217 (5th Cir. 1984):

> representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

The U.S. District Court and the Fifth Circuit reviewed this issue and determined that Sawyer failed to demonstrate that further mitigating evidence, which could have been merely repetitive, could have affected the jury's decision.

In regard to the alleged failure to uncover additional medical evidence to present as mitigating evidence Magistrate Ronald A. Fonseca aptly stated:

> Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization. The fact that Petitioner had been hospitalized was brought out during the testimony of Petitioner's witnesses in the penalty phase of

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[4]The Certification of "was not competent to conduct his own affairs" in Petitioner's Exhibit is explained by the prognosis in the Tennessee report.

> "Guarded. Even though the patient may adjust temporarily at home under the supervision of his parents who overprotect him, he is incapable of competing in the outside world for employment. He will therefore need welfare assistance to stay at home."

The above explanation, quoted from the report, does not indicate the type of deficiency necessary for a legal argument of insanity or incompetency. Thus, the declaration that petitioner was declared incompetent in 1966, is not relevant here. In fact, we know from the Pardon Board Hearing that Sawyer went on to employment as a riverboat pilot, licensed by the Coast Guard.

the trial.

It is a clear principle that Petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. This court clearly stated that "If what Petitioner knows or could discover upon reasonable investigation supports a claim for relief in the federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because the evidence discovered later might also have supported or strengthened the claim." Jones v. Whitley, 1991 WL 133584 (5th. Cir. 1991) at p. 7. The evaluation done by Dr. Alec Whyte adds no new information to what was known about Sawyer's behavioral problems as a teenager, his low intelligence level and medication which were before the jury. The conclusion of Dr. Orrin Devinsky that Mr. Sawyer's brain damage limits his ability to conform his conduct to acceptable behavior, and severely limits his ability to control aggression and impulses regarding his abnormal intelligence were conclusions that were heard by the jury from Dr. Arneson (Tr.R. 1441, 876) and add nothing new to Mr. Sawyer's profile.

Magistrate Fonseca's conclusion (which found that how the jury's decision could have been affected was not demonstrated) was affirmed by the Fifth Circuit panel and the en banc court. The United States Supreme Court affirmed this decision in June, 1990. Since these claims have previously been presented to the state courts on post conviction relief as well as federal habeas corpus, Petitioner's claims are repetitive under La. C.Cr.P. ar. 930.4.A. Honorable Judge Tiemann denied Petitioner's application as repetitive on october 5, 1990. (Exhibit D) The Louisiana Supreme Court denied his writ on October 7, 1990.

At the penalty phase the State put on Peter Thomas, Deputy Prosecuting Attorney for the Sixth District of Little Rock, Arkansas who introduced the indictment, conviction and commitment of Robert Sawyer for involuntary manslaughter in that state. The state then rested and Mr. Weidner put on Glenda White, sister of Robert Sawyer. Ms. White gave twelve pages of direct testimony

describing Robert Sawyer's deprived childhood, abuse by his father, his hospitalization in state mental hospitals, shock treatments, forced drug treatment, abusive treatment by the police in his town, his marriage and birth of his son, the estrangement between he and his son, and her knowledge of Robert's relationship with Cynthia Shano and her two boys. (Tr.R. 1483-1495) Ms. White also testified that she allowed Robert to babysit with her children who loved him. Ms. White emphasized the patience that Robert had with the children as she observed it. After cross examination, Mr. Weidner put on Glen Smith, Sawyer's nephew. He too testified that he never saw Robert Sawyer cruel or experienced mistreatment at Robert Sawyer's hand. He testified that Sawyer played ball with him and took him to the movies and the park.

Then Robert Sawyer himself testified and gave his account of the events that night. He also briefly described his childhood. He claimed that he did not remember the events that night but was sorry that they had happened. (Tr.R. 1508).

The five affidavits of family members merely reiterate the story of Sawyer's abusive childhood heard by the jury. Reiteration is not additional mitigation which could have changed the jury's sentence. See Burger v. Kemp, 107 S.Ct. 3114 (1987). Claim I must fail since Weidner did call family members to testify--Sawyer's sister and nephew. Five more witnesses repeating what the jury heard could not have changed its decision. Mr. Weidner's decision to put on two family members was a strategy choice. Additional family members would have done no more than duplicate the testimony of the sister and nephew. Moreover allegations regarding time spent with witnesses is not enough and was addressed by Mr. Weidner at the post conviction hearing. It is clear, however, that gravity of consultation is insufficient to warrant habeas relief. Schwander v. Blackburn, 750 F.2d at 494, 499 (5th Cir. 1984) and Sawyer v. Butler, supra.

If reviewed on the merits, this claim must fail since Weidner did present mitigating evidence at the penalty phase. Allegations that Weidner did "absolutely nothing" to prepare for the penalty

phase are exaggerated and not factually based. Counsel should be sanctioned for making unsupported allegations in his petition that are clearly refuted in the record of the penalty phase. Moreover, in reference to Weidner's representation of Sawyer, Magistrate Fonseca recognized the state judge's evaluation after hearing Weidner testify at the evidentiary hearing:

> The state trial court concluded in its assigned oral reasons that Petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner]...we had a mature and reasoned and in some ways seasoned certainly beyond his physical, years, for the defense of this gentleman" (R., Evidentiary Hearing, July 12, 1985, p. 187).
>
> A review of the state record convinces us that Petitioner received the effective assistance of counsel in Mr. Weidner's representation.

Furthermore, in regard to the penalty phase, the appropriateness of the death penalty for this heinous crime and for this defendant with a prior homicide conviction of a four year old child is clear. Conclusionary medical statement with no factual basis that would not substantially affect Sawyer's culpability are insufficient to demonstrate that the jury's verdict of death would have been different. In particular, as the district court noted, there are no facts to support treatment for symptoms of a mental condition since the early hospitalization. The jury heard evidence of Sawyer's hospitalization, shock treatments, low average intelligence and medication at the guilt phase. Then at the penalty phase, it heard about his abusive childhood.

Because Sawyer has failed to present any "new" evidence that was not heard by the jury but merely a reiteration and expansion of what the jury did hear, this allegation does not establish cause for failure to bring these claims earlier or to readdress reviewed issues, nor prejudice that he has suffered as a result thereof and he cannot escape the application of abuse of the writ.

C. SAWYER WAS DETERMINED TO BE COMPETENT BY A LEGALLY CONSTITUTED SANITY COMMISSION AND THE TRIAL COURT SUCH THAT HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED.

In this claim, Petitioner asserts that he was incompetent to proceed to trial and that the Sanity Commission rendered an incompetent evaluation. This claim is barred by La.C.C.P. art. 930.4 as a repetitive application since the claim was raised in the trial court and was not pursued on appeal or on Federal Habeas Corpus. Petitioner has presented no new evidence of incompetency at the time of trial such that the omission of this claim on appeal or on habeas review would be excused. Judge Tiemann denied this claim as repetitive and, in the alternative, on the merits on October 5, 1991. (R.E.D.) The Louisiana Supreme Court denied Petitioner's writ on October 7, 1990.

Petitioner herein is barred from raising this claim in a successive petition which he raised on state post conviction applications and subsequent Federal Habeas Corpus writs as an abuse of the writ. 28 U.S.C.A.§2254, Rule 9(b); Sanders v. United States, 83 S.Ct. 1068 (1963); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc). The burden rests on Petitioner to prove by a preponderance of the evidence that he has not abused the writ. Price v. Johnston, 68 S.Ct. 1049, 1063 (1948). Petitioner has failed to overcome the determination made by two psychiatrists and a trial judge in 1980, that he was competent. Attached is an affidavit from trial counsel James S. Weidner, Jr. which reinforces the conclusion of the trial court. (R.E.F.) A professional conclusion today regarding Petitioner's competency ten years ago is ludicrous at best, and reflects poorly on the integrity of the professional making such determination. Clearly, Petitioner has not carried his burden of proof to overcome a dismissal of this claim as an abuse of the writ.

In the alternative, if this Court decides to address the merits of the claim the Court must acknowledge the issue of competency was fully litigated at the hearing of the Sanity Commission.

Dr. Devillier's Report, (R.E. B) and Dr. Arneson's Report, (R.E. C). The purpose of the Sanity Commission is defined in the La.C.C.P. art. 641 et seq. as to determine whether the defendant has the mental capacity to understand the proceedings against him and to assist in his defense.

The medical information which Petitioner now claims would be pertinent to his competency determination is basically irrelevant. Dr. DeVillier in his testimony clearly stated the issue for a determination of competency is whether the defendant is able to understand at the time. The prior medical history does not become important unless the answer to the question of defendant's ability to function at the time of trial is seriously doubtful. Dr. DeVillier said, "We do a clinical interview during the time we do this clinical interview it consists of asking the individual questions and usually we get some background information. That is a history taking kind of thing which consists of what the individual's past is." "During this time, I am observing the way he approaches, the way he answers the question, the effect he shows. The way he organizes in terms of answer the question or what information he volunteers." (Tr.R. 806).

Petitioner clouds the issue of competency with the rendition of his long medical history and a diagnosis from 1966; whereas the central issue for competency is defendant's ability at the time of the trial preparation and the trial itself to understand and assist his counsel. Both trial psychiatrists performed the task that they were hired to do within the statutory mandates. Petitioner has not put forth any significant medical factors which were overlooked at the time of the trial which could have clearly affected the competency determination in 1980.

Moreover, trial counsel James Weidner has been consulted and has submitted an affidavit (R.E. F) to the effect that he did not seriously question Robert Sawyer's competency to assist him at trial. In fact, Weidner found Mr. Sawyer unusually wise as to the law and its application based on Sawyer's numerous experiences with the court system. Clearly, the failure to address the competency further was based on the fact that Mr. Sawyer at no time displayed to trial counsel,

appellate counsel or even the habeas counsel that he was unable to understand and assist them in their defense of him.

Also, Dr. Arneson indicates in her testimony that she did not consider doing a brain wave, as asked in the motion for a Sanity Commission (R.E. A), since it was not pertinent to a determination of competency. Thus it can be seen that Dr. Arneson's understanding of her role was to determine whether or not Petitioner currently could assist his counsel and understand the proceedings. The issue of further diagnosis and testing was inappropriate to determine competency. (R.E.G, Dr. Weidorn's affidavit).

The letter from Dr. Orrin Devinsky identifies that the newest EEG is normal. This supports the State's statements in its previous response that an abnormal EEG has no meaning per se, and that a normal EEG may be recorded shortly thereafter.

Dr. Devinsky identifies that there exists an abnormality in the left frontal lobe. But in the second paragraph, the doctor does not give any reason for his jump from an abnormality in the frontal lobe to the conclusion "compromise his intellectual, emotional and behavioral functions." People often suffer brain damage in the frontal lobe areas which does not manifest itself in behavioral symptoms. The conclusions leap from identification of a slight abnormality in the frontal lobe area are limiting Mr. Sawyer's abilities and behavior. Dr. Devinsky does not demonstrate that this man has any impaired cognitive, intellectual, emotional or behavioral functions that can be directly attributed to the identified abnormality.

Quite to the contrary, Mr. Sawyer admitted at the Pardon Hearing that he was a licensed riverboat pilot who had passed the strict licensing test on his fifth try. He acknowledged that the average number of times to take the test before passing was six. It was also acknowledged that the test involved computational abilities which Mr. Sawyer was able to complete on the test. The psychiatrist present at the hearing admitted that when he did his report on Sawyer's functioning

he did not know he was a licensed riverboat pilot and could find no reasonable explanation to justify his report with that new information. In a second Pardon Hearing, November 11, 1991, Mr. Sawyer retracted his claim to a pilot's license.

There is no allegation in Dr. Devinsky's new report that Mr. Sawyer has not been able to function in jail, or that he has displayed any behavioral activity to indicate impaired cognitive, intellectual or emotional functions within the past ten years.

The minor abnormality found by the MRI scan has not been linked to anything that is alleged by Petitioner. Simply stated, Petitioner has failed to allege facts to support that any cognitive, intellectual, emotional or behavioral functions are currently impaired and were impaired in 1980, that would be linked to this minor abnormality.

Although Petitioner should be procedurally barred from asserting this claim, it has no basis in fact because Petitioner has failed to assert any significant present or past medical factors or behavioral manifestations which would have affected a 1980 determination on competency. Clearly, this claim presents, at the most, support for Sawyer's early dysfunctional behavior, a fact before the jury, but nothing that bears on his "innocence" of the death penalty that would provide cause to escape the abuse of the writ. See Jones v. Whitley, supra.

Moreover, due process only requires Petitioner to have access to psychiatric assistance in two instances:

1. at the guilt phase of a trial, when defendant has demonstrated that his sanity at the time of the offense is likely to be a significant factor in determining guilt; and

2. at the penalty phase when the State presents psychiatric testimony to show aggravating factors.

See Ake v. Oklahoma, supra. Neither applies here and Sawyer is not entitled to an evidentiary hearing. Furthermore, Sawyer is asking this Court to conduct a "psychiatric medical malpractice review" in a federal habeas proceeding. The Ninth Circuit refused to do such in Harris

v. Vasquez, 901 F.2d 724, (9th Cir. 1990).

The Ninth Circuit further decided that Ake was a "new rule" of law which could not be applied retroactively to Harris under Teague v. Lane, supra at 1060. In the instant case, Sawyer's direct appeal became final in 1984. Even if he would be successful on the merits, Ake cannot be retroactively applied to Sawyer under Teague-Penry.

In Harris, supra, the Ninth Circuit further noted that Harris' claims rested on current expert opinions based on pure speculation not probative of the fundamental fairness of his trial or competency of his counsel. As here, the three new expert reports do not give data upon which their conclusions are based that would be required under Ake as probative at the guilt phase or in rebuttal to the State at the penalty phase. Absent is any data regarding Sawyer since the early test that would indicate dysfunction as mitigation.

Furthermore, this Court and the Fifth Circuit have previously reviewed Dr. Brad Fisher's affidavits in King v. Lynaugh, 868 F.2d 1400, 1406 (5th Cir. 1989):

> ... The state habeas court specifically found that Dr. Fisher's proffered affidavit lacked credibility because its conclusions concerning drug use and lack of rational capacity were extremely speculative and unsupported by objective evidence in the record."

The reports/affidavits herein suffer from the same malady and form no basis to grant an evidentiary hearing or excuse the abuse of the writ.

III. PETITIONER HAS NO ESTABLISHED A CONSTITUTIONAL CLAIM WITH A COLORABLE SHOWING OF "ACTUAL INNOCENCE OF THE DEATH PENALTY" UNDER MC CLESKY V. ZANT SUCH THAT A FUNDAMENTAL "MISCARRIAGE OF JUSTICE" WOULD RESULT FROM FAILURE TO MAINTAIN THE CLAIM.

If a Petitioner does not satisfy the cause and prejudice requirements, the federal courts may still entertain successive or abuse of the writ petitions where the prisoner supplements his Constitutional claim with a colorable showing of factual innocence. Kulhman v. Wilson, supra. The

Kulhman court quoted Judge Friendly's definition "Rather, the prisoner must show a fair probability that, in light of all evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Kulhman, supra at 2627, n. 17. In McClesky v. Zant, the cause and prejudice analysis was applied to an abuse of the writ through inexcusable neglect where the allegations affected the guilt-innocence phase of the trial. In that case, the court discussed the fundamental "miscarriage of justice" as applied to the claim before it because it found that McClesky could not establish cause and prejudice for omitting his claim in prior writs. In determining that McClesky did not satisfy the miscarriage of justice criteria the court said "that narrow exception is of no avail to McClesky. The Massiah violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination." McClesky v. Zant, supra at 1474. The court then concluded that the alleged Massiah violation did not cause the conviction of an innocent person.

A. ANALYSIS OF DEFINITION: ACTUAL INNOCENCE OF DEATH PENALTY

The actual innocence of the death penalty was addressed by the Fifth Circuit in Cuevas v. Collins 932 F.2d 1078 (5th Cir. 1991) where it held that Cuevas's argument that his court ordered competency evaluation were fundamentally flawed had no factual basis and did not demonstrate cause and prejudice for the omission of the claim in earlier federal habeas petitions. This court held the claim barred by the doctrine of writ abuse without defining the fundamental "miscarriage of justice" at the penalty phase of the capital trial. In Byrd v. Collins, 934 F.2d 629 (5th Cir. 1991), without defining "actual innocence", again concluded that whatever may be "extraordinary" level of Penry type evidence not given expression under the question of deliberateness and future dangerousness sufficient to render a Petitioner "actually innocence" of a sentence as opposed to

error that "might have affected [its] accuracy", it was no presented by Cuevas. It reached the same conclusion in Byrd. Byrd v. Collins, supra at 630. The Fifth Circuit again addressed the issue without defining the application of actual innocence in a capital case in Jones v. Whitly, supra.

The 8th Circuit defined the "innocence" or "miscarriage of justice" exception in the death penalty context as "in the penalty phase context, this exception will be available if the federal Constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life." Smith v. Armontrout, 888 F.2d 530, 545 (8th Cir. 1989). The 11th Circuit said that factual inaccuracy is not sufficient to demonstrate actually innocence of the death penalty in Johnson v. Singletary, supra. The court reasoned that if prejudicial factual inaccuracy alone is enough to warrant review of a defaulted claim, then the actual innocence standard is meaningless. The court tied a defendant's claim to innocence in the sentencing context to legal eligibility. The court required, "the Petitioner must show that absent the alleged Constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is ineligible for the death penalty."

Sawyer herein fails to establish a colorable showing of factual innocence of the death penalty under the 8th Circuit's definition, the 11th Circuit's definition or under his own definition. The alleged facts supporting his claims are either manufactured, based on a manipulation of the evidence, or hearsay testimony of third parties.

The Supreme Court acknowledged in Smith v. Murray, 106 S.Ct. 2661, 2668 (1986) that the concept of "Actual," as distinct from "legal," innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. The alleged error in the Smith case was the admission of the psychiatrist's testimony at the sentencing phase of the trial. The court, in determining to uphold the procedural default principles in this case, said that the application of the cause and prejudice test would not result in a fundamental miscarriage of justice.

After reviewing the evidence the court found that the alleged Constitution error neither precluded the development of true facts nor resulted in the admission of false ones. Smith v. Murray, supra at 2668.

Despite the definition that this court may assign to "actual innocence of the death penalty", after a review of the allegations of Petitioner and the evidence developed at trial, the admissions and omissions did not serve to divert the jury deliberations concerning the ultimate question whether in fact the death penalty was the appropriate punishment for Mr. Sawyer and the facts and circumstances of this particular crime as mandated by Furman v. Georgia, supra, (1972) and Woodson v. North Carolina, supra.

In order to support a claim of actual innocence of the death penalty Sawyer alleges that James Weidner was incompetent as counsel for not interviewing the witnesses, not investigating the medical history and school records more fully, and by allowing false evidence in at the trial. To support these claims Petitioner argues that ALL probative evidence in mitigation must be before the jury. The absurdity of this standard is self evident and needs no further explanation.

B. ANALYSIS OF FACTUAL BASIS

The alleged facts that form the basis of this claim are supported by double and triple hearsay affidavits of people trying to remember events and conversations from ten years ago. The affidavits also recite a litany of complaints about and character assassinations against Cynthia Shano which do not go to the guilt or innocence of Mr. Sawyer. Sawyer, who was living with Ms. Shano at the time, would have to assume some responsibility for abuse and neglect of children living with them. Remarkably missing from Petitioner's affidavits are statements from Wayne Shano himself, Cynthia Shano herself, Detective Paul Livaudais who interviewed Wayne Shano and Phillip Boudousque, the

prosecutor in the case who would have been authorized to offer immunity to a witness in exchange for testimony. Hearsay and character assassination affidavits such as included in Petitioner's appendices could be manufactured for many other criminal cases ten years after the fact. This analysis shall address each of the Petitioner's claims:

1.) Shano's alleged agreement to testify in exchange for immunity.

2.) Wayne Shano's alleged statement to police that Mr. Sawyer did not set the victim on fire, but rather tried to stop the co-defendant, Charles Lane, from doing so.

3.) An alleged second can of lighter fluid (the one used in the murder) found in the trash can on the day following the crime which was located based on Wayne Shano's statement.

4.) The alleged fact that Detective Paul Livaudais told the prosecutor he detected an odor of alcohol on Shano at the time he arrived on the scene.

5.) The allegation that the State failed to disclose a letter received by Cynthia Shano from Charles Lane.

6.) Ms. Shano was allegedly out of the house at the time of the arson.

Number 1

As can be seen from (R.E. H), the affidavit from Phillp Boudousque, the State's prosecutor, no deal was ever offered to Cynthia Shano. Cynthia Shano Schoennagel's affidavit, (R.E. I), corroborates Mr. Boudousque's statements. And without some evidence other than hearsay affidavits, Petitioner has failed to prove this allegation.

Cynthia Shano testified at Charles Lane's trial six months prior to Sawyer's trial, in March 1980. Ms. Shano's account of Ms. Arwood's torture, rape, burning and murder is remarkably consistent in the trials, especially under the allegations of false testimony. It must also be remembered that Charles Lane and Robert Sawyer were found in the house, and that Cynthia Shano fled the house scared to death, shaking and hysterical. Charles Lane and Robert Sawyer both gave statements to the police and accused each other. Neither man accused Cynthia Shano of

participating in the crime. The physical evidence clearly established that both men participated somehow in the crime. The important question was whether one of the men was the major perpetrator. And, after a thorough investigation, the evidence, physical and oral, indicated that Robert Sawyer was the major actor in the torture and murder of Francis Arwood.

The only people who can testify as to promises that the State made would be Cynthia Shano, the prosecutor and/or anyone present at the time that the promises were made. Petitioner has failed to produce and affidavit of Cynthia Shano, the prosecutor or any witness who was present at the time an alleged promise was made. Attached is Phil Boudousque's affidavit which attests to the fact that Cynthia Shano was not only not promised anything in return for her testimony but never considered for indictment of a crime.

Ms. Shano's affidavit verifies this fact. Clearly, the testimony of Thomas Champagne, Jr. from the motions held on May 29, 1980, refute any alleged fabrication by Cynthia Shano. Thomas knocked at the door and was nearly knocked over when Cynthia came out. (Mt.S. P. 77-78) Mr. Champagne admitted that Cynthia personally told him that they kept her locked in the room so she could not get out. His testimony reveals a very shaken and upset person who did communicate to him that "Robert and Chuck beat up Fran."

Hearsay testimony of what people perceived the relationship between Cynthia Shano and the prosecutor to be is not fact and cannot be relied upon to reverse a conviction. As revealed by Shano's affidavit, counsel tried to get Cynthia Shano to recant her testimony and failed. Hearsay statements cannot be taken for the truth of the matter that they assert. This is a basic rule of evidence of which counsel should be aware.

Mr. Thomas P. Champagne, Sr., affidavit has already been addressed. The affidavit of Peter Champagne, husband of Sylvia Champagne, represents double hearsay and is totally unreliable and inadmissible as evidence at trial as counsel for Petitioner should know.

The affidavits attached by Petitioner's counsel represent hearsay statements which cannot be accepted as true. Cynthia Shano had a relationship with Sawyer and had absolutely no reason to finger him as the leader in the crime. If she intended to be devious it would be more reasonable for her to nail Charles Lane as the major actor. Simply put, the Gretna Police and the investigators had no reason to suspect that Cynthia Shano played a role in the torture, rape and death of Fran Arwood. Nor has Sawyer proposed a motive for the police and prosecutor to allegedly alter and/or conceal evidence to make Robert Sawyer the major actor over Charles Lane. It was of no consequence to the State whether Sawyer or Lane instigated the torture, burning and death of Fran Arwood.

Number 2

The affidavit from Detective Paul Livaudais, (R.E. J), who interviewed Cynthia Shano's son, Wayne, verifies what Petitioner should have read in the police report (R.E. L) that he had possession of: that Wayne Shano identified Robert Sawyer as the person who poured lighter fluid on Francis Arwood. The only person present when Livaudais questioned Wayne was Cynthia Shano according to his report. Petitioner's reliance for this accusation on the hearsay affidavit of Diane Thibodeaux instead of Wayne Shano's is unconscionable. Moreoever, this traumatic event happened over 10 years ago when Wane was four years old. since Livaudais' report was made within five days of the crime, it must be given more credibility than an affidavit of a woman who might have been present at an interview ten years ago. Neither Sawyer nor Lane implicated Cynthia Shano in the crime by their statements. Whether or not Sawyer actually fired the lighter fluid is not critical since his prints were found on the lighter fluid can indicating he participated in that part of the crime. Cynthia Shano's version of the events, consistent at both trials, must be believed. These versions include the fact that Sawyer punched, kicked, beat Fran Arwood, walked on her back and

poured scalding water on her while having the key to the front door in his pocket.

Wayne Shano' interview by the Gretna Police was given to the defense counsel in the form of the Gretna Police report. appellate and post-conviction counsel had the police report also. It does not represent exculpatory evidence, in fact, it is very damaging to Robert Sawyer although the child did not testify. His statements were damaging to Robert Sawyer but were not used since he was a four-year old child probably not competent to testify and suffering psychologically as a result of this incident.

There was no exculpatory evidence available to the State. Sergeant Livaudais' interview of the child, Wayne Shano, is documented in the Gretna Police report which was given to Betty Cole, Catherine Hancock, Wiley Beevers and Jim Weidner. Counsel Trenticosta has either failed to read the police report or has misled this court as to its contents.

Number 3

A silver cigarette case was found in the trash located outside of the home. It was listed as evidence in the police report. The silver cigarette case was never used as evidence at trial and is no longer in possession of the Clerk of court for Jefferson Parish, Louisiana. The silver cigarette case can be seen in pictures of the outside of the house. It appears that the cigarette case is sculptured which would make it difficult from which to obtain fingerprints. At no place in the police reports is there any indication that a second can of lighter fluid was ever found at the crime scene must less any evidence that would indicate that this alleged can of lighter fluid was used in the crime. Counsel for Sawyer argued the cigarette case was significant in his First Supplemental and Amended Petition filed Nov. 8, 1990, but has since changed that argument to a 2nd lighter fluid can without any factual explanation. Such whimsical conduct should be sanctioned under Rule 11.

Petitioner also fails to indicate what significance the silver cigarette case plays in the scenario. Robert Sawyer's fingerprints were found on the lighter fluid can. Even had Lane poured the fluid from the cigarette case onto Fran Arwood that alleged fact would not erase the fact that fingerprints of Robert Sawyer were found on the lighter fluid can, an indication that he probably participated in the burning of the victim. It would not negate the facts that he hit, kicked, walked on and scaled Ms. Arwood; that Sawyer had the key to the front door and could have, at any time, left the house to get help to stop Lane from doing these things to Arwood as he now claims.

Number 4

The Petitioner alleges that a document (R.E. N) found in the prosecutor's file, which appears to be questions to be asked of Detective E. J. Geiling, indicates that Cynthia Shano lied on the stand. The logic of the factual connection from alleged potential questions to be asked of a fact witness and a conclusion that another witness lied escapes Respondent. But if Petitioner's reasoning is accepted, that the notation "odor of alcohol on Cynthia Shano" is to be accepted as true, then the notation above "the odor" notation that says "describe Cynthia Shano Ever considered a suspect -- not from evidence that was collected nothing didn't really have proof one way from another." should also be accepted as true. This puts to rest any allegations that Cynthia Shano was ever a suspect and threatened with indictment thereby requiring immunity. Petitioner proposes this Court draw contradictory conclusions from one sentence of a document but ignore other sentences. Such reasoning is frivolous.

Cynthia Shano testified that she does not drink (Tr. R. 1134). Whether or not Cynthia Shano made three trips to the store to buy alcohol is no indication that she herself drinks. Furthermore, the notation "odor of alcohol on Cynthia Shano" could have been a note to establish the fact that the detective did not perceive that Cynthia Shano had been drinking. Moreover, these

notations are the work-product of the attorney from trial preparation and cannot be assumed as facts or truths. Petitioner's basis of his claim is not grounded in fact and is not a good faith argument for modification of any existing law and has been imposed for improper purposes such that he should be sanctioned under Rule 11 for unnecessary delay and increasing the cost of litigation.

Number 5

Cynthia Shano's consistent testimony in both trials is indicative of her veracity and accuracy about the events that occurred in that house which resulted in the torture, rape, burning and death of Francis Arwood. As can be seen from Cynthia Shano's testimony, Robert Sawyer was the instigator in the events. All persons involved testified that Sawyer and Shano met Charles Lane for the first time that evening in a bar. Since Cynthia Shano had a relationship with Robert Sawyer and had never known Charles Lane before that evening, there is no reasonable explanation besides the truth to support her version of the events. The letter (R.E. M) from an inmate to Cynthia Shano is dated January 27, 1981. This trial occurred in September, 1980.

Petitioner's post-conviction relief counsel, Elizabeth Cole and Catherine Hancock, had access to this file as attested to by Mr. Credo in his affidavit (R.E. K). As to the substance of this letter, it is not the sort of hearsay testimony that can be relied on. It is a letter from an inmate reflecting his interpretation of what Charles Lane allegedly told him. Cynthia Shano's testimony in both trials consistently identified Robert Sawyer as the major actor in the torture-death of Francis Arwood. How Charles Lane interpreted that testimony cannot be assigned to Cynthia Shano nor can conclusions that are ill-founded be drawn from this interpretation by another inmate. It was clear from the testimony at trial that Robert Sawyer and Cynthia Shano had a love relationship from Texas which continued here in Louisiana. It was also clear from the testimony at trial that Charles

Lane was not known by any of the neighbors, Cynthia Shano, her family nor Fran Arwood. Thomas Champagne testified that Robert Sawyer had been going out with his aunt and that he had never seen Charles Lane and did not know Lane prior to this incident. (Tr.R. 1135). Sylvia Champagne testified that she had never seen Charles Lane in her life prior to that incident. (Tr.R. 1114).

The simple truth is that Cynthia Shano told the truth at both trials despite her love relationship with Robert Sawyer. That truth happened to reduce Charles Lane's culpability which, combined with no prior crimina record, probably encouraged the jury to impose a life sentence over the death penalty. That Lane is grateful for her telling the truth is undeniable. This inclusion of a letter that was written after the trial of this matter and the accusations made against Phillip Boudousque clearly support sanctions under Rule 11. Counsel failed to tell the court about another inmate letter found in the prosecutor's file which identifies Sawyer as the major player and leader in the torturous and deadly behavior that killed Ms. Arwood. (R.E. O).

Number 6

Sawyer claims that, based on Diane Thibodeaux's affidavit, Wayne Shano said that his mother was out of the house at the time that Fran Arwood was burned. At the trial, Ms. Shano admitted to having diarrhea at the time. While she was in the bathroom she smelled something burning and asked them what it was. When she came out of the bathroom she realized that they had burned Ms. Arwood. (Tr.R. 1151). The same testimony was elicited at Charles Lanes's trial at page 319 of Cynthia Shano's testimony. Whether Ms. Thibodeaux's information is correct and Wayne Shano did not know where his mother was, it is of no consequence to the guilt or innocence of aggravated arson regarding Robert Sawyer. This is another example of counsel's manufacturing facts from hearsay and failing to direct the court to the portions of the testimony that would give a reasonable explanation for the whereabouts of Cynthia Shano at the time of the child's

perception.

IV. UNDER THE DOCTRINE OF PRINCIPALS, LA. R.S. 14:24, ROBERT SAWYER IS ELIGIBLE FOR A FIRST DEGREE MURDER CONVICTION AND SENTENCE OF DEATH DESPITE THE FACTS ALLEGED IN THIS PETITION.

In Louisiana, under La. R.S. 14:24,[5] all persons who aid and abet in the commission of a crime, whether directly or indirectly, may be charged and convicted with that crime. The doctrine of principals is limited to those crimes for which a person personally has the requisite mental state. In the case of a first degree murder conviction, the requisite mental state is that the defendant had the specific intent to kill or inflict great bodily harm. It is not enough to find merely that the accomplice had the accomplice had the necessary mental state, since this intent cannot be imputed to the accused. State v. Holmes, 388 So.2d 722 (La. 1980).

The Louisiana Supreme Court reviewed Sawyer's conviction and sentence of first degree murder for the sufficiency of evidence under the Jackson v. Virginia standards, supra. The court determined that despite the testimony of laymen and psychiatrists regarding Sawyer's allegedly intoxicated condition and its effect on his ability to form a specific intent to kill or inflict great bodily harm, the jury reasonably rejected the defense. The court found ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found defendant acted with specific intent, despite his excessive consumption of alcohol. State v. Sawyer, supra at 95 (La. 1982), reh. denied (Nov. 24, 1982). If the alleged "essential facts" that Sawyer claimed the jury should have heard were in fact before the jury, they would not have made a difference such that a sufficiency of evidence review under the Jackson standard would not survive.

---

[5]La. R.S> 14:24 (Principals) - All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

The alleged immunity offer could be introduced as hearsay testimony by witnesses who could only repeat innuendo statements. The testimony of Diane Thibodeaux regarding Wayne Shano's statement Paul Livaudais would be inadmissible hearsay. The alleged second can of lighter fluid could not be introduced from the absence of facts to support its existence found in Petitioner's brief. The issue of alcohol was addressed with Cynthia Shano at trial. The alleged abuse and neglect of Shano's children would not be admissible under relevancy. The alleged acquaintance of Charles Lane and Shano before the crime would have been overbalanced by the testimony of Shano, Thomas Champagne, Jr., and detectives who verified that Charles Lane had just met Robert Sawyer that night in the lounge.

The evidence of Sawyer's organic personality syndrome with its conclusory statements not based on facts would not have balanced Dr. Arneson 's testimony regarding specific intent and Sawyer's personality. Dr. Arneson was called as a witness by the defense and in answer to an inquiry regarding Mr. Sawyer's mental condition during the crime she answered:

A.) "Mr. Sawyer had drank that much alcohol and his behavior toward victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there with his feet up near the head of the victim, then it would been my opinion that he was psychotic and it was a toxic psychosis secondary to the alcohol."

Q.) "Doctor, when a person is in a toxic psychosis are they able to form intent?"

A.) "No, not in the usual sense." (Tr. R 1439)

After reviewing the evidence that Sawyer wishes to introduce and the problems that he may have introducing the evidence because of lack of factual basis, hearsay and/or relevancy, the conviction and sentence of Robert Sawyer would still survive a Jackson v. Virginia sufficiency of

evidence review.

Clearly, under Louisiana law, the evidence supported Robert Sawyer's specific intent to commit the crime based on his participation in the crime. The testimony at trial established that Robert Sawyer locked the front door and had possession of the key, that he intimidated Cynthia Shano to go to a bedroom, that he actively participated in the beating, the scalding, the burning, and the torture of Fran Arwood. This participation and failure to prevent the events support his participation in the crime such that a reasonable juror could infer from the circumstances that he had the specific intent necessary for a first degree murder conviction.

Even under the United States Supreme Court standards, a defendant may be convicted and sentenced to the death penalty for a felony that resulted in a murder when his participation is major and his mental state is one of reckless indifference. Tison v. Arizona, 107 S.Ct. 1676 (1987). The testimony in the instant case, even if the alleged essential facts proposed by Sawyer were admitted, would establish at least a reckless indifference under the federal jurisprudence which would support a conviction of first degree murder and a sentence of death.

After reviewing the Louisiana law of principals and the federal jurisprudence under Tison v. Arizona, it is clear that Robert Sawyer has not produced any alleged facts that could change his participation in the crime enough to eliminate his eligibility for a first degree murder conviction and sentence of death. Thus Sawyer has failed to establish an actual innocence of the death penalty such that a denial of his writ based on an abuse of the writ would not be a fundamental miscarriage of justice.

CONCLUSION

For the foregoing reasons, Robert Sawyer's writs should be denied based on an abuse of the writ and the stay of execution should be vacated.

Respectfully Submitted,

DOROTHY A. PENDERGAST
ASSISTANT DISTRICT ATTORNEY
COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
(504) 368-1020

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served on Loyola Death Penalty Resourse Center and Counsel of Record by placing same in the United States mail, postage prepaid, this 13th day of November, 1991.

DOROTHY A. PENDERGAST

IN THE

SUPREME COURT OF THE UNITED STATES

* * * * *

ROBERT WAYNE SAWYER,
PETITIONER

VERSUS

JOHN P. WHITNEY, WARDEN, LA. STATE PENITENTIARY
RESPONDENT

* * * * *

STATE OF LOUISIANA'S RESPONSE IN OPPOSITION TO STAY OF EXECUTION, AND WRIT OF CERTIORARI OF SECOND WRIT OF HABEAS CORPUS

* * * * *

RECORD EXCERPTS

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
BAR ROLL #9679
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
GRETNA, LOUISIANA 70053
(504) 368-1020

RECORD EXCERPTS

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H. Affidavit Of Philip J. Boudousque

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STATE OF LOUISIANA

VERSUS

ROBERT SAWYER

24th JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 79-2841

SECTION: G

FILED: _____ DEPUTY CLERK

MOTION TO APPOINT SANITY COMMISSION AND TO ORDER MEDICAL OBSERVATION AND TESTS

On the motion of the undersigned attorney for Robert Sawyer, appearing herein for the sole purpose of moving the Court to order a medical examination of the defendant and such tests are tests, including but not limited to the following: a brain scan test, which will enable medical experts to determine the lack of mental capacity or the extent of medical capacity of the defendant for the following grounds : to wit:

The defendant, Robert Sawyer, does not understand the nature of this act, nor was he aware of the difference between right and wrong and he is unable to assist his attorney in his defense.

Further there should and ought to be a sanity commission appointed in accordance with the Code of Criminal Procedure. Article 641 at sec for the purpose of a determination of the defendant's competency towards his counsel and his defense.

JAMES S. WEIDNER, JR.
TOOLEY, WALDMANN AND WEIDNER
743 Terry Parkway
Gretna, Louisiana 70053

ORDER

The foregoing motion considered, let a mental examination of the above named defendant be had forthwith, such mental examination to include such tests are are suggested by such medical experts. Further, let a sanity commission be appointed herein for the purpos

EX. A

[redacted]

A

of examining and reporting the mental conditions of the defendan including but not limited to the defendant's competence to assist counsel in his defense and defendant's sanity at the time of the alleged crime.

Let the following doctors be appointed as members to the sanity commission, to wit:

Dr. Dr Vickie;

Dr. Anson; and Dr. Frank

Dr. [redacted]

These doctors are to report to this Court on the 5th day of June, 1980, the results of their examination and the findings of their tests and give their opinions.

Gretna, Louisiana, this 23rd day of May, 1980.

JUDGE

PLEASE SERVE:

THE DISTRICT ATTORNEY FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA

ALBERT B. DEVILLIER, M.D.
8731 CHESTNUT ST.
NEW ORLEANS, LA. 70118
TELEPHONE 866-7184

June 10, 1980

The Honorable Judge Charles Gaudin
Division C
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana 70053

Re: Robert Sawyer

Dear Judge Gaudin:

The following is a psychiatric evaluation on Robert Sawyer as requested by the Courts in connections with a Lunacy Hearing to be held June 12, 1980. The subject was examined at Jefferson Parish prison on June 9, 1980.

The subject is a 29 year old white male who is originally from Memphis, Tennessee. He has been living in the New Orleans area for about 2 years with his common-law wife. He has an 8th grade education and is able to read some and write. His occupation has been working on boats as both a pilot and deckhand. He has been doing this same type of work for the last 14 years. He has never been in the armed services.

The subject states that approximately when he was 16 or 17 years old he took some type of medication for about three months. He had been hospitalized in Memphis, Tennessee. He doesn't know exactly why he was put into the hospital. While he was hospitalized he was put on medication, but he stopped taking the medication after getting out and hasn't taken any since. He denies ever having seizures or convulsions. He states that he does not abuse drugs, but he has drank heavily for a long period of time. He drinks mostly Scotch. He indicates that his drinking takes place when he is not working.

In regards to the charges, the subject indicates that he is charged with first degree murder. As he indicates "I remember bits and pieces". He stated that he had been drinking all night with his common-law wife and they had left the lounge about 4:30 in the morning. He remembers staggering into the house and the babysitter indicated to him that she had given two of the children some pills to help them sleep. With that he hit her and he indicates that is all he remembers.

B

Ex. B

Judge Charles Gaudin
Re: Robert Sawyer
June 10, 1980

MENTAL STATUS EXAMINATION: The subject is a short white male about 5'4" tall weighing 136 pounds. He has very poor dentures. He has an artificial left eye. He indicated that he lost his left eye in 1971 in a car wreck. He denies having any hallucinations or delusions and there is no evidence of any thought disorder. His memory seems to be intact and he has fairly good insight and he is cooperative.

PSYCHIATRIC IMPRESSION:

1. In my opinion the subject is legally sane in that he knows right from wrong, mentally competent in that he understands the nature of the charges against him and is able to assist counsel in his own defense.

Sincerely yours,

Albert B. DeVillier, M.D., Psychiatrist

ABD/el

Genevieve A. Arneson, M.D., F.A.P.A.
1911 FOURTH STREET
GRETNA, LA. 70053
TELEPHONE 367-4979

June 9, 1980

The Honorable Judge Charles Gaudin
Division G
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana

Re: Robert Sawyer

Dear Judge Gaudin:

Following is a psychiatric evaluation on Robert Sawyer, as requested by the Court recently in connection with a Sanity Hearing to be held June 12, 1980. The subject was examined at the Jefferson Parish prison on June 2, 1980.

The subject is a 29 year old Caucasian male resident of Gretna, Louisiana. He is originally from Memphis, Tennessee and has been in the New Orleans area since 1978. He is a widower, his wife was killed in an automobile accident in 1971. He has a 10 year old son who lives back in Tennessee. His occupation he gives as a deckhand working on the Mississippi River. He says he has an 8th grade education, left school at 14 years of age because he had to go to work. He also had a good bit of learning difficulties and was in special education classes. He states that he was hospitalized one time in a psychiatric unit and placed on lithium in 1966. He remained in the hospital for three months. He was told that he was "too active." He states that his mother committed suicide by gunshot wound when he was three months of age. He was raised by his paternal grandmother.

Subject states he has been in prison for 8 months, arrested September 18, 1979, and charged with first degree murder. He states that the individual he is alleged to have murdered did not expire until November 21, 1979. When asked about the charges the subject launched into a long detailed, overly inclusive story about the circumstances leading up to the alleged offense. He claims that he was angry at this woman who was babysitting for his girlfriend's children, after he discovered that she had been giving the children drugs. He also states that at the time of the alleged offense he was inebriated with a cheap wine called "Mad Dog 20-20." He states "that will make you crazy." He states that the events surrounding that time are known to him only in "bits and pieces."

C

Re: Charles Gaudin
June 9, 1980
Re: Robert Sawyer

MENTAL STATUS EXAMINATION: The subject presents as a small 29 year old Caucasian male. He is 5 ft. 2 in. tall, weighs 136 lbs. His appearance is marred by a facial defect in the left ocular area and a prosthetic left eye which tears frequently. He has straight black hair, hazel eyes, poor dentition, a slight degree of prognathism. Affect is rather flat as he describes tremendous events in an offhand manner. As noted, he goes into extreme detail, overly inclusive, and has difficulty reaching his goal idea. Thinking is simple and concrete. No evidence of hallucinations or gross delusions at this examination. Intelligence is estimated as low-average or borderline.

PSYCHIATRIC IMPRESSION:

1. No evidence of psychosis. No gross abnormalities in the mental status at this time.
2. Probable sociopathic personality.
3. In my opinion the subject would be considered legally sane and mentally competent to stand trial at this time.
4. From the subject's description he was intoxicated on wine at the time of the alleged offense and therefore it is probable that he has a toxic amnesia for the details of the alleged offense.
5. In the body of the motion to appoint a sanity commission it is mentioned that a brain scan test should be included which would enable medical experts to determine lack of mental capacity or the extent of mental capacity for the following grounds. It should be noted that this type of test would not give the information that is desired.

Sincerely yours,

Genevieve A. Arneson, M.D.

GAA/am

STATE OF LOUISIANA, PARISH C JEFFERSON

24th Judicial District Court

State of Louisiana

VS.

ROBERT WAYNE SAWYER

No. 79-2841

Division G

Date 10/5/90

CR: LINDA LABORDE

DISTRICT ATTORNEY DOROTHY PENDERGAST JUDGE M. JOSEPH TIEMANN

THIS MATTER APPEARED ON THE DOCKET TODAY FOR A HEARING ON THE PETITION FOR POST-CONVICTION RELIEF TO VACATE JUDGEMENT AND SENTENCE, WRIT OF HABEAUS CORPUS, AND MOTION FOR STAY OF EXECUTION AND EVIDENTIARY HEARING. PRESENT WERE: NICHOLAS TRENTICOSTA, ATTORNEY FOR THE DEFENDANT, AND DOROTHY PENDERGAST, ASSISANT DISTRICT ATTORNEY FOR THE STATE OF LOUISIANA. DEFENSE COUNSEL WAIVED THE PRESENCE OF THE DEFENDANT. THE MATTER WAS ARGUED AND SUBMITTED. THE PETITION FOR POST-CONVICTION RELIEF TO VACATE JUDGEMENT AND SENTENCE AND THE MOTION FOR STAY OF EXECUTION AND EVIDENTIARY HEARING WAS DENIED BY THE COURT. THE COURT FINDS THE MATTERS HAVE ALREADY BEEN LITIGATED AND RULED ON; IN THE ALTERNATIVE, THE COURT CONSIDERS THE CLAIMS TO BE WITHOUT MERIT. ORAL NOTICE BY THE DEFENSE TO FILE WRITS.

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

DEPUTY CLERK

EX. D

Entry No. 21

D

T. 1-98 MON 16 4 JOHN MAMOULIDE D.A. P.08

E

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further disclosure of this information

CLINICAL RECORD | NARRATIVE SUMMARY

6/16/66 | 12/23/66

Sawyer, Robert Wayne, 21,Mth

The following is a final summary on Robert Wayne Sawyer, case number 21,[illegible], 18 year old, white single male, education special classes, religion Methodist, admitted for the first time on 6-16-66 from Shelby County by RI commitment (competency removed). He has been an out-patient at Collier Clinic since February, 1966, diagnosis moderately retarded, chronic brain syndrome manifested by moderate retardation and abnormal E.E.G.

Reason for Admission: On Sunday prior to admission patient allegedly walked [illegible] of Children's toilet near a church and tried to choke her. Two years ago patient was accused of attempted rape. In February, 1966, patient went to live in Texas, to live with a paternal aunt. While in Texas he continued to run away. His aunt felt that she could not longer control his behavior and she returned him back to Memphis.

On Admission: Patient admitted attacking a 10 year old woman sexually but was not successful. He denied visual and auditory hallucinations.

Physical Examination: Non contributory. Height 5'3", Weight 123 lbs., Temperature 97.6, Blood pressure 110/90. Laboratory findings and x-ray findings within normal limits.

Course in the Hospital: He was placed on Mellaril 100 mgs. t.i.d.c., Thorazine [illegible] mgs. h.s. Patient woke his bed every night. He had full privileges. However, he began to annoy the girls on the hospital grounds and privileges were removed. He was placed on [illegible] in the Dental-Vocational Building. He began to work in the employee dining room, however, he failed to make an adequate adjustment. He talked about going home all the time. He felt that he was not in a position yet to go back to work. He showed childish behavior, lack of responsibility and he went AWOL on the day when his family came to visit him. He was discharged December 23, 1966, 30 days after his admission. During his hospital stay he received some [illegible] as well as tranquilizing drugs with little improvement in his mental attitude.

Mental Status on Day of Leave December 23, 1966:

Attitude and Behavior: He is fairly neat and clean in appearance, pays [illegible] interview and interviewer.

Stream of Mental Activity: Productions relevant, coherent, though becoming [illegible] in character.

Emotional Reactions: Emotional deterioration, inappropriate affect, childish

CLINICAL RECORD | NARRATIVE SUMMARY

Page 2

behavior, grimacing and mannerisms noted.

Thought Content: No overt psychosis. No ideas of reference, influence, or perceptions could be elicited. However he does feel that nobody likes him in school, that nobody is interested in him, even though his family visits him very often and apparently are overprotective of him.

Sensorium is clear. Orientation - oriented in all spheres. Memory is adequate both for recent and remote events. Attention and concentration fair. General information and calculation adequate and commensurated with his education. Apperception poor. Patient does not realize the degree of his psychogenic dissolution. Insight, judgment and reasoning defective.

Mental Diagnosis: 22.7 Schizophrenic reaction, childhood type

Physical Diagnosis: None apparent

Patient is incompetent. Competency removed. Patient is a minor.

Mental: Severe

Professional: Severe

Emotional: Severe

Apparently this patient failed to identify himself with parents or siblings and lack of ego strength and ego ideal is the dynamic cause of the patient's illness.

Physical Diagnosis: None apparent

Prognosis: Guarded

Even though the patient may adjust temporarily at home under the supervision of his parents the overprotect him he is incapable of competing in the outside world for any length. He will therefore need welfare assistance by State or Home.

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further Disclosure of this information

Form 4 MD - 34
REV. AUG. 61

STATE OF TENNESSEE
DEPARTMENT OF MENTAL HEALTH

CERTIFICATION OF MENTAL COMPETENCY

TO THE COUNTY COURT CLERK OF Shelby COUNTY, Tennessee

IN RE: Rogers, Robert Wayne

433-436

CERTIFICATE

In accordance with Section 33-633, Tennessee Code Annotated (Chapter 86, Public Acts 1961), I Edwin H. Levy, M. D., Superintendent of Western State Hospital for the mentally ill at Bolivar, Tennessee, do hereby certify that Robert Wayne Rogers, of Shelby County, has been a patient at this institution and was discharged as of the 28 day of December, 19 66, as a patient from this institution and in my opinion the above named person at the time of discharge was was not competent to conduct his own affairs.

Given under my hand at office as Superintendent of said hospital this 10 day of January, 19 67.

J. D. Pendelli, M. D.
Ward Physician

Max Bramwell M.D.
Superintendent

NOTE: Under Section 33-633, Tennessee Code Annotated, the Superintendent must certify his opinion as to whether the person is or is not competent to conduct his own affairs. In the event the person is competent to conduct his own affairs, the County Court Clerk should present the certificate to the County Judge or the statute is mandatory for the County Judge, without a Hearing, to enter an order on the minutes of the County Court restoring full legal rights to the person. If, in the opinion of the Superintendent, the person is not competent to conduct his own affairs, the certificate should be filed as a record in the case in the office of the County Court Clerk.

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further Disclosure of this information

STATE OF ~~SOUTH CAROLINA~~ North Carolina]
]
COUNTY OF ~~YORK~~ Mecklenburg] AFFIDAVIT
]
]
]
]
]
_____]

Before me, the undersigned Notary Public, came and appeared James S. Weidner, Jr. and after being duly sworn did depose and state:

That he was the lead trial attorney for Robert Sawyer and did represent him at his trial for First Degree Murder. That prior to commencing the trial, Robert Sawyer gave no indication of being unable to proceed to trial. Robert Sawyer answered questions put to him, seemed to understand the nature of the proceeding, acted in an appropriate manner and gave no indication of being mentally unable to proceed with the trial.

James S. Weidner, Jr.

Sworn to on this 9th
day of October, 1990

Michelle N. Mutz
Notary Public
My Commission Expires September 5, 1994

F

PARISH OF JEFFERSON
STATE OF LOUISIANA

AFFIDAVIT OF WILLIAM S. WEIDORN, M.D.

SUMMARY OF REVIEW OF MEDICAL RECORDS AVAILABLE ON ROBERT SAWYER AND OBSERVATIONS OF ROBERT SAWYER AT PARDON BOARD HEARING AT ANGOLA ON OCTOBER 8, 1990

I reviewed the medical records from Robert W. Sawyer's adolescence and hospitalizations in Tennessee. I reviewed the trial transcripts of the testimony of the Sanity Board Hearing members in 1979. And I reviewed the most recent reports of 1990 by the psychiatrist, Dr. Alec Whyte, the neurologist, Dr. Orrin Devinsky and the clinical psychologists, Brad Fisher.

In essence there are three sets of diagnoses: 1) from his adolescence and hospitalization in Tennessee, 2) from the Sanity Board Hearing, 3) the most recent set of reports by the above named consultants. In his teens, he was diagnosed as suffering from schizophrenia, childhood type. This is difficult to substantiate based upon the report of that period because the reports describe his psychological functioning in such a way that schizophrenia would not be present. Further, the most recent psychological test does not show any suggestion of schizophrenia. Therefore, it is difficult to support that diagnosis. Further, during these adolescent hospitalizations, one electroencephalogram was reported as an abnormal EEG. This is a finding and not a diagnosis and in and of itself little can be made of it.

At the time of his trial, one of the psychiatrists raised the question of his being a sociopathic personality (in current diagnostic terminology this is now termed antisocial personality). The Sanity Board at that time devoted themselves to following the mandate of the court, that is, to assess whether or not Sawyer was competent to stand trial and whether or not he was competent to understand the charges against him and assist his attorney. According to their testimony they felt that Sawyer was able to do all of those things.

Finally, the most recent consultants of 1990 reach diagnoses of Organic Personality Syndrome and Mental Retardation. In reviewing the data one can interpret the current data as being possibly suggestive of Organic Personality Syndrome. However, one could also interpret the data as being suggestive of Antisocial Personality, and in addition, one could interpret the data as being sufficient of no psychiatric disease present. Thus, it is difficult to substantiate these formal diagnoses at this point.

The question of whether or not he is mentally retarded is also a difficult one. Past and current psychological tests would suggest a degree of Mental Retardation. However, Mr. Sawyer's testimony at the Pardon Board Hearing was to the contrary in that he described himself as being a licensed riverboat pilot, he

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described himself as functioning in this capacity for a number of years, etc.

In reading the various medical documents available on Robert Sawyer, I am not able to find descriptions of abnormal behavior or abnormal psychological functioning which would be sufficiently interfering with his ability to perform in trials, at hearings, etc. Thus, even if any one of the above listed diagnoses were accurate, and it is difficult to assess any degree of accuracy for them at this time, the question still would remain as to whether or not Robert Sawyer was able to function in his own defense and work with his attorneys in understanding the various procedures that he is involved in at this time.

In reading these reports, I am unable to find any descriptions of such limitations of his functioning regardless of the various diagnoses which have been offered over this man's lifetime.

WILLIAM S. WEIDORN, M.D.

SWORN TO AND SUBSCRIBED

BEFORE ME THIS 22ND DAY

OF OCTOBER, 1990.

NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared, Philip J. Boudousque', who after being duly sworn did depose and state:

I.

That he was the Assistant District Attorney for the Parish of Jefferson, who prosecuted Robert W. Sawyer for the murder of Francis Arwood.

II.

That after the arraignment, the State of Louisiana offered to Robert W. Sawyer, through his attorney of record, Wiley Beevers, an opportunity to plea to the crime of the first degree murder of Ms. Arwood and receive a mandatory life sentance without benefit of probation, parole or suspension of sentance.

III.

The offer made to Mr. Sawyer through his attorney was made only once and then for a period of limited duration, i.e., the amount of time it took for Mr. Beevers to convey the offer to Mr. Sawyer, thoroughly discuss the plea with his client and return with an answer to the District Attorneys Office.

IV.

That Robert W. Sawyer was only offered a plea to first degree murder with a mandatory life sentance without benefit of probation, parole or suspension of sentence because of the state's concern as to whether there was a legal basis to warrant a finding that Mr. Sawyer was engaged in an enumerated felony pursuant to La.C.C. Art. 14:30 during the course of the murder.

V.

That the District Attorney's Office for the Parish of Jefferson considered Robert W. Sawyer to be the primary

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instigator and the most culpable participant in the Arwood murder.

VI.

That when Robert W. Sawyer declined to plea to a mandatory life sentence without benefit of probation, parole or suspension, the state never again considered a life sentence.

VII.

That at the time the above stated offer was made and subsequently rejected, the trial court had not severed the trials of Robert W. Sawyer and Charles Lane.

VIII.

That Sawyer's decision obviated the need to make a similar offer to Charles Lane.

IX.

To affiant's knowledge, information and belief, Cynthia Shano was always a cooperative witness on behalf of the state and that at no time did a representative of the District Attorney's Office ever put pressure on Ms. Shano regarding her testimony.

X.

That the affiant, as an Assistant District Attorney for the Parish of Jefferson, never considered bringing charges to a Grand Jury against Cynthia Shano regarding the Arwood murder.

PHILIP C. SCHOENEGGE

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 15th DAY
OF NOVEMBER, 1989.

NOTARY PUBLIC

Philip J. Kellogg
LOUISIANA BAR ROLL NO. 11,000

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

Before me, the undersigned authority, personally came and appeared:

CYNTHIA SCHOENNAGEL

a person of the full age of majority, who first being duly sworn did state that:

1. Prior to October 10, 1990, and since that time Nicholas Trenticosta, Sarah (last name unknown) and another female have been coming to her residence and insisting that she change her testimony in the case against Robert Sawyer, in particular to state that she had made a deal with the District Attorney's Office to avoid prosecution.

2. They have been to her residence on several occasions, often when her husband was not at home.

3. She has spoken with them on at least seven occasions and on many occasions have seen them outside of her residence and pretended not to be home.

4. On at least one occasion they have walked into her home without knocking.

5. On more than one occasion she has asked them to quit coming around her house and to quit harassing her to no avail.

6. On Wednesday, October 31, 1990, their last visit to her home they accused her of lying and told her she was being watched. The visit turned into a shouting match on her front porch causing the neighbors to come out to see what was going on.

7. As of this date there is a white car in front of her home which leaves each time she comes out. This vehicle has been in the neighborhood since the visits from Robert Sawyer's attorneys started.

8. She was never charged in connection with the murder of Frances Arwood and never cut a deal with the District Attorney's Office to avoid prosecution therewith.

9. She is currently under treatment for a heart condition, and taking medication. The harassment by these individuals is hazardous to her health.

Cynthia Schoennagel

SWORN TO AND SUBSCRIBED BEFORE ME,
NOTARY PUBLIC, FOR AND IN THE
PARISH OF JEFFERSON, THIS 15th DAY
OF November 1990.

NOTARY

I

AFFIDAVIT

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

PAUL E. LIVAUDAIS

who, after being duly sworn did depose and stated:

He is and has been a police officer with the City of Gretna since May 31, 1975.

He was so employed by the City of Gretna as a police detective on September 28, 1979 and was called on to investigate an aggravated battery and burning of a 23 year-old white female at 928 Porter Street; Gretna.

The investigation was begun on September 28, 1979, and was being conducted by affiant.

On September 29, 1979, affiant telephoned Cynthia Shano, mother of Wayne Joseph Shano, who was four years of age.

Mrs. Shano stated to affiant that her son, Wayne Joseph, was present throughout the beating and burning of the victim and could tell me what actually occurred.

I met with Cynthia Shano and her son Wayne Joseph Shano at 928 Porter Street Gretna, Louisiana on September 29, 1979. When this officer arrived, I briefly spoke to the mother, Cynthia Shano, then spoke to Wayne Joseph Shano. Wayne Joseph was calm and very readily stated to me that "my daddy, (Bobby) hit that girl with a hammer." I asked Wayne Joseph where was his daddy when his daddy hit the girl with the hammer and Wayne Joseph immediately led me to the northeast bedroom of the residence and showed me a blood stain where according to Wayne Joseph his daddy Bobby hit the girl with the hammer and the blood had come from the girl's mouth and face.

I then asked Wayne Joseph if he saw anything else and Wayne Joseph told me that his daddy (Bobby), threw what he used to burn

[redacted]

the girl away in the garbage bag. I was then led by Wayne Joseph to a garbage bag located in the southwest corner of the residence. This bag was full of garbage so I took the bag out to the front lawn and emptied its contents. Upon the contents falling to the ground Wayne Joseph pointed to an aluminum half of a cigarette case and stated to me that this item was used by his daddy Bobby to pour lighter fluid on the girl's body and burn her.

I then had the necessary evidence collected and left the residence.

At no time during the questioning of Wayne Joseph did Wayne Joseph implicate Mr. Lane in the beating and burning of the victim. Wayne Joseph referred to his "daddy Bobby" throughout the interview, but never was Mr. Lane mentioned. Wayne Joseph at no time told me that his daddy tried to stop Lane but only implicated his daddy Bobby (Robert Sawyer) as being the only person who beat and burned the victim Francis Arvood throughout the ordeal.

Paul E. Livaudais
PAUL E. LIVAUDAIS

Sworn To And Subscribed
Before Me this 27
day of November, 1990.

Beverly A. Pinchaud
NOTARY PUBLIC

AFFIDAVIT

PARISH OF JEFFERSON

STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

WILLIAM C. CREDO, III

who, after being duly sworn did depose and state:

THAT, he was the Assistant District Attorney assigned to the original habeas writ application filed by Petitioner Robert Sawyer.

THAT, in conjunction with the original state habeas proceeding, Petitioner Robert Sawyer was represented by Catherine Hancock and Elizabeth Cole.

THAT, to the best of his memory, both Ms. Hancock and Ms. Cole had open file discovery which included a full review by them of the police reports involved in the original trial of Robert Sawyer.

THAT, to the best of his knowledge, after reviewing the file in this matter, the above statements are true and correct.

WILLIAM C. CREDO, III

Sworn To And Subscribed
Before Me this 26
day of November, 1990.

NOTARY PUBLIC

[redacted]

K

GRETNA POLICE DEPT.

SUPPLEMENT REPORT

	WILCOX, Francis	N/A	9-11-96-
928 Porter Street, Gretna, La.	9-28-79	10-3-79	
N/A	9	N/A	
RS 14:27/30 Attempt Murder		N/A	

4 living room and kitchen. The victim was then taken from the floor put on the bed in the living room, where lighter fluid was poured on her breast and down the front of her nude body and set afire.

On Saturday the 29th day of September 1979 the undersigned officer was contacted by Cynthia Shano of 918 Porter Street, Gretna, La. Cynthia Shano stated to the undersigned officer that her four year old son Wayne Joseph Shano was present through the whole incident that had occurred on 9-28-79, and could tell the undersigned officer what had occurred in his presents. The undersigned officer then met with Cynthia Shano and her four year old son Wayne Joseph Shano at approximately 4:00 P.M. at 918 Porter Street, Gretna, La. It was learned at this time that Wayne Joseph Shano's DOB was 2-15-76. The undersigned officer then questioned Wayne Joseph Shano in the presents of Cynthia Shano. According to Wayne Joseph Shano his Daddy Bobby hit that girl with a hammer. The undersigned officer then asked Wayne Joseph Shano to show the undersigned officer the location that the victim was when he observed his Daddy Bobby hit the girl with a hammer. Wayne Joseph Shano then led the undersigned officer to the North East bedroom and pointed to the bed and stated that blood was coming from the victim's mouth and face. (Note: A sample stain was taken from the mattress of this same bed and is listed as Exhibit #5). It was further learned from Wayne Joseph Shano that his daddy Bobby discarded what he used to burn the victim, in the garbage bag. The undersigned officer was then led to the utility room which is located at the South West corner of the residence and was shown a

DETECTIVE BUREAU
INTELLIGENCE
NARCOTICS
RESCUE
VICE
NONE

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SUPPLEMENT REPORT — GRETNA POLICE DEPT.

2. COMPLAINANT / ARRESTED / VICTIM, OR OTHER: Lawson, Francis		3. ARREST NO.: N/A	4. COMPLAINT NO.: 0-[illegible]-79
5. PLACE OF OCCURRENCE: 928 Porter Street, Gretna, La.	6. ORIGINAL DATE OF OCCURRENCE: 9-28-79	7. DATE OF SUPPLEMENT: 10-3-79	
8. VALUE OF PROPERTY LOSS: N/A	9. PAGE NO.: 10	10. CORRECT OFFENSE OR INCIDENT CLASSIFICATION: N/A	11. CRIME OF: ☐ YES
12. KIND OF ELEMENT CONTINUED: ☐ OFFENSE ☐ TELEPHONE ASSESSMENT ☐ ARREST ☒ FOLLOWUP OR SUPPLEMENTAL		13. MULTIPLE CLEARANCE? ☐ YES (LIST OTHER COMPLAINT NOS. IN NARRATIVE) ☐ NO	
14. OFFENSE, CHARGE OR INCIDENT ON ORIGINAL REPORT: RS 14:27/30 Attempt Murder		15. VALUE OF PROPERTY RECOVERED: N/A	

16. INSTRUCTIONS FOR FOLLOWUP OR SUPPLEMENTAL USAGE. UNDER NARRATIVE, RECORD YOUR ACTIVITY AND ALL DEVELOPMENTS IN THE CASE SUBSEQUENT TO LAST REPORT. DETAILS AND RECORD VALUE OF ANY PROPERTY RECOVERED. NAMES AND ADDRESS NUMBERS OF ANY PERSONS ASSOCIATE CLARIFICATION CHANGE. CLEARLY SHOW DISPOSITION OF RECOVERED PROPERTY AND INVENTORY AS APPROPRIATE TO SUPERVISOR CODE STATUS AND TO PROVIDE ULR DISCOVERY. INDICATE ITEM NUMBER CONTINUED AT [illegible]

ITEM NO. 14

filled garbage bag. The undersigned officer then removed the garbage bag to the front lawn of the residence and emptied the contents. While seperating the contents the undersigned officer was shown by Wayne Joseph Shano a 1/2 part of a cigarette case, silver in color. Wayne Joseph Shano stated to the undersigned officer that this was the item used to burn the victim by his Daddy, Bobby. The undersigned officer was then shown a pair of green ladies panties by Cynthia Shano. Cynthia Shano stated to the undersigned officer that the green panties were the same panties worn by the victim prior to the victim taking a bath. It was also learned from Cynthia Shano that a third party may have been at the residence when the victim was beaten, scalded and burned. Cynthia Shano stated that it may be that the victim's X husband Jack Arwood was present. It was further learned from Cynthia Shano that the two Robert Sawyer and Charles Lane talked about taking the victim to Slidell La. and finishing her off.

After finding additional evidence at the scene the undersigned officer called for a B of I Unit. At approximately 4:51 P.M. Officer D. Deauzat of the Jefferson Parish Sheriffs Office arrived. Officer Deauzat took the necessary photographs and collected the evidence for processing. The B of I Unit left the scence at approximately 5:05 P.M.

The undersigned officer secured and left the scene at approximately 5:10 P.M.

17. REPORTING OFFICER: Det. P. E. Livaudais	NO.: 116	18. STATUS (CHECK ONE): ☐ OPEN ☐ SUSPENDED ☐ CLOSED	20. FORWARD COPY TO: ☐ DETECTIVE BUREAU ☐ INTELLIGENCE ☐ NARCOTICS ☐ RESCUE ☐ VICE ☐ NONE
19. APPROVING OFFICER	NO.	21. SUPERVISOR APPROVING	NO.

RECORDS AND IDENTIFICATION

1-21-81

Hi Cindy

I am just writing a few lines to say hello, and I hope by the time this letter get to you it will find you in the very best of health.

Just in case you are wondering how I got your address it so from a guy name Charles Lane he said you was a ~~friend~~ wonderful friend of his and you like to write to pepole

I am 5'8 weigh 132 lb. I got black hair and brown eyes and 24 years old my name is William Rausch and I like to meet new pepole and I like to make new friends.

Charles told me that you have two boys and they name is Wayne and Troy Please mail me a picture of all the of yous for I can see who I am writing to.

He also said that you look like a girl name April the one on T.V. and believe me she is a fox.

Charles told me yesterday that he was getting out soon and you and him was going back together soon. He always talk about you all the time he don't know I am writing this letter because I am in my cell.

Cindy I don't mean to come between you and Charles in anyway but I would really enjoy writing to you.

Charles said that you really helped

My Name is Leroy Murray
2020 Paine DR. Marrero La
phone 340-4516

a-2-80

To Whome Make concern
That i Was a inmate in J.P.C
11-778 - 1-19-80 With Charles lane
on 4 B L one morning We Went to
Gym and setting around and We
Were talking about our trouble What
Charles friend told me about his and
Charles case he told me how he kick
and punch the girls in her chest and
head and he told me that charles did
not do the girl Nothing but try to help
her and how Charles stops her from
drowning in bath tub and i told him
Man you much be crazy from beating
a Woman like that and told me the girls
gave his to Children sed pills and they
eyes was in the back of they head and
he try to Kill the bitch from doing that
to his Kids and said he Was drunk
him and Charles and Charles past
out and did not Know all What
happen.

2) him alot in court because he was able to say alot of what he did on the other guy and that kept him from getting the death penalty so he owe you a lot for helping him.

I hope to hear from you real soon because your letters would real mean alot to me because I don't get too many letters in here and I hope you can understand that because when you get letters in here time goes alot faster in here and with out any letters time drages along. I hope that this letter don't make you mad because it is just a friendship letter. Well I am going to let you go because I know that you got a lot to do may God bless you and may God be with you and your family

From a friend
William

P.S. Write me back soon and keep that wonderful smile

JOINT

APPENDIX

VOL. I

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. 91-6382

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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VOLUME I

NICHOLAS J. TRENTICOSTA*
R. NEAL WALKER
SARAH L. OTTINGER
210 Baronne St.
Suite 608
New Orleans, Louisiana
70112
Telephone: (504) 522-0578
Counsel for Petitioner

JOHN M. MAMOULIDES
District Attorney
24th Judicial District
Parish of Jefferson
State of Louisiana

DOROTHY PENDERGAST*
Assistant District
Attorney
Courthouse Annex
Gretna, Louisiana
70053
Telephone: (504) 386-1020
Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed November 13, 1991
Certiorari Granted November 14, 1991

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Affidavit of Betty Shano. R. 00625-29

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, November 14, 1991

OCT 18 1982

SUPREME COURT OF LOUISIANA

NO. 81-KA-1566

STATE OF LOUISIANA

versus

ROBERT SAWYER

On Appeal From the Twenty-Fourth
Judicial District Court Parish of Jefferson,
Hon. H. Charles Gaudin, Judge

LEMMON, Justice.

This is an appeal from a conviction of first degree murder and a sentence of death. The principal issue on review of the guilt phase of the trial is the sufficiency of the evidence of aggravated arson as an essential element of the offense. R.S. 14:30. The principal issues on review of the penalty phase involve (1) admission into evidence of defendant's indictment for second degree murder in an unrelated incident and his subsequent plea to involuntary manslaughter, (2) the sufficiency of the evidence supporting the aggravating circumstances found by the jury, and (3) the prosecutor's closing argument.

Facts

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children.

Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.[1]

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and

---

[1] Whether Ms. Shano stayed out all night with defendant or returned home earlier during the evening was the subject of conflicting testimony. That dispute, however, is not critical to the resolution of any significant factual or legal issue in the case.

the severity of the injuries caused her to die several weeks later without ever regaining consciousness.[2]

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists.[3] A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious.

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[2] One of the doctors described the cause of her death as "metabolic exhaustion" resulting from severe blows to her head and incredibly severe (third degree) burns over more than one-third of her body.

[3] She was probably also forced to engage in sexual intercourse with Lane during a brief period when Lane was left to guard her while defendant was boiling water in the kitchen to scald her. Although the record does not necessarily support an inference that she was raped at that point in time, this is not fatal to either the conviction or the sentence; as will be discussed later.

Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.[4]

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

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[4] Ms. Shano testified that Lane told her his sex organ had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. She further testified that defendant then told Lane "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get".

There were also burn marks on the new sheets on the sofa bed as a result of the incident, and defendant's fingerprints were found on a can of lighter fluid.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

The grand jury indicted both men for first degree murder. Lane was convicted in a separate trial and sentenced to life imprisonment.[5] Defendant was convicted and sentenced to death.

Review of Guilt Phase

Defendant contends the evidence was insufficient to establish the essential elements of first degree murder.

R.S. 14:30, defining first degree murder, at the time of the offense provided in pertinent part:

> "First degree murder is the killing of a human being:

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[5] His conviction was affirmed by this court. See State v. Lane, 414 So.2d 1223 (La.1982).

plainly sufficient to support the conviction.[8] See State v. Lane, above; Jackson v. Virginia, 443 U.S. 307 (1979).

(Continued from previous page)

primarily on the creation of foreseeable risk of great harm to humans, the igniting of "kindling" or lighter fluid for the purpose of engulfing a human body (or part of a human body) in flames might suffice – as long as the endangerment element is satisfied.

Nevertheless, as stated above, resolution of that question is not required here, because defendant did set fire to bedclothes by pouring lighter fluid and igniting it, and that act endangered the victim's life.

[8] The evidence was sufficient to support the conviction because of the jury's supported finding as to the commission of the offense of aggravated arson, and it is unnecessary to determine whether the evidence also established beyond a reasonable doubt that defendant was a principal to the offense of aggravated rape. Significantly, the jury found (in enumerating the aggravating circumstances after the penalty hearing) that defendant was engaged at the time of the killing in the commission of an aggravated arson (and not of an aggravated rape).

There was no error, however, in the trial judge's instructing the jury regarding the elements of aggravated rape. The evidence justified an instruction on the essential elements of the offense, and the jury was capable of drawing reasonable inferences from the evidence based on the trial court's instructions.

Finally, the prosecutor's [sic] mention in closing argument (without contemporaneous objection) that there were two rapes, one of which was proved by the fact that Lane was alone in the bathroom with the victim for 10 to 20 minutes, was certainly not sufficiently prejudicial to warrant a reversal of the conviction.

Additional Facts in Penalty Phase

At the sentencing hearing, both the state and defendant offered additional evidence.

Over defense objection, the state called a deputy prosecutor from Arkansas to present documentary evidence establishing the circumstances of defendant's prior indictment for second degree murder in the killing of a four-year old child and his eventual plea to involuntary manslaughter. The records also revealed that the trial court was presented with the facts of the incident before accepting defendant's plea of guilty to involuntary manslaughter and sentencing him to serve three years in prison.[9] Defendant was released on parole after one year and successfully completed his parole.

Defendant and his older sister both testified about defendant's unhappy childhood. Defendant's mother

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[9] According to the facts contained in the record, the young victim, who was the daughter of a woman with whom defendant was living, had been left in defendant's care while her mother went to work. Defendant brought the child to the emergency room of the hospital to be treated for injuries, which eventually resulted in her death. The medical evidence indicated that the child received a severe blow to the head. Further examination revealed bruises, scars and burn marks suggesting that the little girl had been the victim of earlier physical abuse.

The Arkansas prosecutor eventually accepted defendant's plea that the killing was committed "without malice" and without an intent to "produce death". See Section 41-2209, Arkansas Criminal Code. Defendant claimed that he was trying to discipline the child (who was allegedly "playing in her food") when the child's highchair fell over, causing her to hit her head on the concrete floor.

committed suicide shortly after the birth of defendant and a twin sister, when the older sister was only four years old. The circumstances forced the family to separate, and, according to defendant's sister, his father seemed to blame defendant for the family woes. He was extremely harsh and brutal with defendant.[10] As a child, defendant was faced with long hours of hard work on his father's Tennessee farm. He received few rewards or gratifications for his labors, either in terms of parental words or actions reflecting praise and affection, or in opportunities for traditional childhood activities.

Understandably, defendant began to run away at an early age. He was eventually institutionalized, but ran away from the state mental health facility. He lived with various relatives until he was about 17, when he left to begin a series of riverboat jobs.

Defendant also gave his version of the events leading to his prior conviction for involuntary manslaughter. In response to defendant's professions of accident and of love and affection for the child, the prosecutor cross-examined him about the cause of various injuries on the

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[10] One incident related by defendant's older sister described the frustration he faced as a child. His grandfather had given defendant a calf to raise. His father persuaded defendant to let him sell the calf to raise funds for the farming operation, agreeing to allow defendant to participate in a ball game in town. When the day of the eagerly awaited game arrived, the father refused to drive the boy to town, and defendant, then a preteen child, walked and hitchhiked the eight miles to the town. Upon his return, his father brutally beat him for acting contrary to his wishes.

child's body and about a statement he gave to police admitting that he had whipped the child.

Despite the evidence offered in mitigation, the jury recommended the death penalty, relying on three aggravating circumstances: (1) that defendant was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that defendant had previously been convicted of an unrelated murder.

Review of Penalty Phase

Because the jury recommended the death penalty, this court must review the record to determine that the prosecutor and the trial court adhered to the procedural protections outlined by the Legislature and that the sentence is not excessive. See Gregg v. Georgia, 428 U.S. 153 (1976). In reviewing a death sentence, we are required by Supreme Court Rule 28 to consider:

> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
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> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Sufficiency of Evidence of Statutory Aggravating Circumstances

C.Cr.P. Art. 905.3 requires that the jury find beyond a reasonable doubt the existence of at least one of the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4 before the jury can even consider recommendation of the death sentence. And Supreme Court Rule 28(b) requires that this court, on review for excessiveness, determine that the jury's finding was supported by the evidence.

The jury found the existence of three statutory aggravating circumstances. The evidence is clearly sufficient, as discussed earlier, to support the jury's finding with respect to the commission of an aggravated arson. The evidence also supports the jury's finding that the offense was committed in an especially cruel, atrocious and heinous manner.[11]

Defendant argues, however, that every aggravating circumstance found by the jury must be supported by the evidence and that the evidence does not support a finding that defendant was previously convicted of an unrelated murder. See State v. Monroe, 397 So.2d 1258

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[11] This court has construed this provision to include only those homicides in which the victim was subjected to "serious physical abuse . . . before death". State v. Sonnier, 402 So.2d 650, at 659 (La.1981). Thus, only in those cases in which the offender tortured or pitilessly inflicted unnecessary pain on the victim has this court held that this aggravating circumstance was supported by the evidence. See State v. Baldwin, 388 So.2d 664 (La.1980). See also State v. Culberth, 390 So.2d 847 (La.1980). The record in this case overwhelmingly supports such a finding.

(La.1981). The last portion of defendant's argument is correct, in that a finding of a conviction for an unrelated murder is not supported by a record which reflects only a conviction for involuntary manslaughter. State v. Culberth, 390 So.2d 847 (La.1980). However, C.Cr.P. Art. 905.3 only requires that the jury find the existence of one aggravating circumstance in order to consider recommending a sentence of death.

This court has upheld death sentences when only one of several aggravating circumstances found by the jury was supported by the evidence (as long as defendant was not unduly prejudiced by failure to comply with procedural safeguards or by the influence of arbitrary factors during the penalty phase, and as long as the death sentence was not otherwise excessive). State v. Martin, 376 So.2d 300 (La.1979). cert. denied, 449 U.S. 998; State v. Monroe, above.[12] The adequately supported finding of

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[12] At the time of this offense (although not at the time of the crime in the *Martin* and *Monroe* decisions), R.S. 14:30 required, as an essential element of first degree murder, the existence of at least one of four enumerated aggravating circumstances, which were also among the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4. Therefore, under the present law the class of murderers for which the death penalty is potentially available has already been narrowed by the additional elements now necessary for a conviction of first degree murder, and a supported verdict of guilty of first degree murder in the guilt phase of the trial automatically fulfills the threshold requirement of a finding of at least one statutory aggravating circumstance, thereby authorizing the jury to consider imposing the death penalty. The penalty phase now serves primarily to afford an opportunity for the prosecution to offer proof of additional aggravating circumstances and for the defense to offer proof of mitigating circumstances.

the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenders properly exposed to the possibility of the death sentence.[13] See Williams v. Maggio, 679 F.2d 381 (5th Cir.1982) (en banc).

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[13] In Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 1855 (1982), the United States Supreme Court (after the death sentence was reversed by a three-judge panel of the Fifth Circuit) remanded to the Supreme Court of Georgia for certification of the question of the state law premises that support the validity of the death sentence when one of the statutory aggravating circumstances found by the jury was constitutionally invalid. The present case, unlike *Stephens*, does not involve a facially unconstitutional aggravating circumstance. Moreover, C.Cr.P. Art. 905.3 is the state law basis in Louisiana for the jury's consideration of imposition of the death penalty when only one statutory aggravating circumstance found by the jury is supported by the evidence.

Finally, the use of statutory aggravating circumstances, which was approved in Gregg v. Georgia, above, as a method of channeling the jury's discretion in the determination of which first degree murderers are "death eligible", is particularly important in a capital sentencing scheme in which any intentional murder may be a capital offense. Unlike the Georgia statutory scheme (in which proof of a statutory aggravating circumstance in the penalty phase is a crucial consideration in the Jury's determination of which first degree murderers should be punished by death), Louisiana's present capital sentencing procedure requires (as noted in Footnote 12) the finding of an aggravating circumstance in the guilt phase of the trial, and the class of murders for which the death penalty will even be considered by a jury has already been significantly narrowed by the Legislature as a method of guiding sentencing discretion. Under the present law, many first degree murders in Georgia would be second degree murders in Louisiana.

Thus, under Louisiana's statutory scheme, the jury at the penalty trial must in effect make two separate but closely related findings in order to recommend a death sentence. The jury must first find the existence of *at least one* statutory aggravating circumstance as a threshold requirement before even considering imposition of the death penalty. If an aggravating circumstance is found, then the jury must take into account any mitigating circumstances and must make a separate finding regarding whether the death penalty should be imposed, *considering both the particular crime and the particular offender.* If the jury recommends the death penalty, this court must review *each* of the two separate jury findings.

Here, the supported finding of the commission of aggravated arson fulfilled the requirement of C.Cr.P. Art. 905.3 and the review requirement of Supreme Court Rule 28(b) regarding a supported finding of the existence of at least one aggravating circumstance. The [illegible] of a determination by this court that the evidence [illegible] not support the finding of an *additional* aggravating circumstance is a question which is more pertinent to the review of the jury's second finding – that is, the finding regarding the appropriateness of the death penalty for this particular crime and this particular murderer. We will address that question in the context of a discussion (in the next subsection) of whether evidence, which was offered in support of an unproved aggravating circumstance, introduced an arbitrary factor into the penalty phase which misdirected the jury's sentencing discretion.

Passion, Prejudice or other Arbitrary Factors

The evidence offered in support of the unproved aggravating circumstance in this case consisted of the official records of the Arkansas circuit court and prison pertaining to defendant's conviction of involuntary manslaughter. Defendant objected to this evidence on the basis (1) that the documents were hearsay and were not properly authenticated and (2) that evidence of the indictment for second degree murder was inadmissible because only evidence of the conviction was admissible.

A review of the record reflects that the documents were properly certified and were also authenticated by the testimony of the deputy prosecuting attorney. They were identified as properly certified copies of original documents, which were official records of the circuit court and of the Arkansas State Prison.[14] We therefore

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[14] As this court said in State v. Nicholas, 359 So.2d 965 (La.1978):

> "Generally, if an official writing is proved to come from the proper office where such documents are kept, the document will be authenticated as genuine by the certification of the custodian because of the presumption that he will carry out his duty to receive, record and certify only genuine official papers and reports." 359 So.2d at 969; see also 7 J. Wigmore, Treatise on Evidence §§ 2158-2159 (3d ed. revision 1940); McCormick, Law of Evidence § 224 (2d ed. 1972).

See also R.S. 15:457 and R.S. 15:529.1.

conclude that admission of the records was not barred by the lack of authenticity or by hearsay rules.[15]

Defendant's second ground for objection raises the question of what evidence is admissible in the penalty phase of the trial. C.Cr.P. Art. 905.2 declares that the hearing shall focus on the circumstances of the offense and propensities of the offender, but does not provide any specific rules regarding the admissibility of evidence at this unique type of hearing. At a sentencing hearing in a noncapital case (in which the judge will determine the sentence), many of the usual rules of evidence do not apply, because the postconviction focus on the appropriateness of sentence is vastly different from the preconviction focus on guilt or innocence. See Williams v. New York, 337 U.S. 241 (1949). which was cited in *Gregg* for the proposition that in "the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender". 428 U.S. at 187.

The instant case presents the question of whether evidence of a prior unrelated conviction of involuntary manslaughter (which clearly is relevant to a focus on the character and propensities of the offender) is admissible in the prosecution's case in chief, before the defendant

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[15] Compare State v. English, 367 So.2d 815 (La.1979), in which this court reversed a death sentence because the state failed properly to authenticate certain documents offered at the penalty trial.

takes the stand or otherwise puts his character at issue.[16] In Jurek v. Texas, 428 U.S. 262 (1976), the Court, although not specifically addressing the issue, approved a capital sentencing procedure in which any relevant evidence may be introduced in the penalty phase *after* the offender has been found guilty under a statute (similar to Louisiana's present statute) which defines first degree murder to require the finding of an enumerated aggravating circumstance as an essential element of the offense.[17] The Court did not discuss the scope of evidence admissible in the penalty phase, but relevance obviously cannot be the sole criteria for determining admissibility. It is logical

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[16] The usual prohibition against a jury's hearing evidence of other crimes, when such evidence tends merely to show a defendant's bad character, is not applicable in the penalty phase of a capital trial, because (unlike the guilt phase) the inquiry is designed to focus on defendant's character.

[17] In Jurek, the court noted:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. * * * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option – even potentially – for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime."

that the offered proof should also conform to the other *applicable* rules of evidence and that procedural safeguards for fairness (such as notice) must be considered in determining admissibility.

We will not attempt in this decision to lay down detailed rules for admissibility of evidence in the penalty phase, but will address the issue only insofar as it is necessary to decide this case.

We hold that the evidence of the prior unrelated conviction of involuntary manslaughter was properly admitted, although the conviction did not qualify as an unrelated murder under C.Cr.P. Art. 905.4(c) and although defendant did not take any steps to place his character at issue. In the penalty phase of a capital case, the defendant's character *is* at issue and indeed is one of the principal issues.[18] In this particular case, the evidence

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[18] The prosecution arguably should be allowed to affirmatively negate the mitigating circumstances that defendant "has no significant prior history of criminal activity". C.Cr.P. Art. 905.5(a). If the prosecutor cannot introduce evidence of prior convictions in the case in chief during the penalty hearing, and the defendant introduces no character evidence, then the jury might be misled into believing that the existence of the mitigating circumstance has been proved by the absence of evidence.

Although the penalty hearing is to be conducted according to the *applicable* rules of evidence, the usual prohibition against the prosecution's initiation of the inquiry into defendant's character is simply not applicable in the penalty phase, where the focus on character is one of the statutory means of channeling the jury's sentencing discretion.

of the prior conviction not only was extremely relevant, but also was competent and highly reliable. Moreover, defendant was apparently prepared to meet the evidence and in fact did so with testimony rebutting or explaining the official record's factual statement which served as the basis for acceptance of the plea. We therefore conclude that the evidence of the conviction was properly admitted and did not constitute an arbitrary factor which improperly influenced the jury's sentencing discretion.

As to the evidence of an initial indictment for second degree murder (in the same incident), there was extensive testimony from both defendant and his sister concerning defendant's version of the incident. Even if the fact of an indictment for a greater offense (than the one to which defendant eventually pleaded) should have been excluded, the gravamen of the evidence was a presentation of the facts of the occurrence, and admission of the indictment was certainly not reversible error.

There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. State v. Willie, 410 So.2d 1019 (La.1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See State v. Lindsey, 404 So.2d 466 (La.1981), and State v. Willie, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact

that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the "living death of life imprisonment", which implied that defendant could never be released.[19] Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor

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[19] The only reference in closing argument to the possibility of pardon was:

> "The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it related to Robert Sawyer because it's not."

misguided the jury's sentencing discretion by the introduction of inappropriate considerations.[20]

We also note that the prosecutor commented on Lane's conviction and sentence to life imprisonment. In response to defense counsel's beyond-the-record comment that Lane was sentenced to life (a fact not previously revealed to the jury) and to the suggestion that defendant should receive the same sentence, the prosecutor retorted by arguing (also beyond the record) that he had handled Lane's case and that there were aggravating circumstances present in defendant's case which were not present in Lane's case.

A strong admonition by the trial court, in which he instructed the jury not to consider the comments of either counsel regarding Lane's case, effectively prevented prejudice. The jury was clearly given the impression that defendant's case must be evaluated on its own merits, without regard to the sentence imposed on his original co-defendant.

Proportionality and Excessiveness of Sentence

Subsection (c) of Rule 28 requires this court to extend its review beyond the evidence submitted to the jury. We

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[20] Prosecutors tread on dangerous ground by mentioning the availability of pardon. Even though such a remark is accurate, it has little relevance to the penalty determination, except to give the jury a complete picture of the overall scheme for punishing first degree murderers (and perhaps to correct inaccurate defense statements or implications that a murderer under sentence of life imprisonment can never be released from prison).

must, in effect, decide whether the jury's recommendation of the death sentence was disproportionate, reviewing both the facts presented to the jury and the other materials submitted to us on review. We must consider the recommendations of juries in similar cases (from the judicial district), as well as the character of the defendant and the nature of his crime.

This is the sixth death sentence recommended by a jury in Jefferson Parish since 1976. It is only the third death sentence from that parish which we have upheld.[21] In one other case of a death sentence, we remanded for further evidentiary determinations.[22] In another, we remanded for a new penalty trial due to procedural flaws in the initial proceedings.[23] In one other case, the death penalty was set aside because of improper closing argument.[24]

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[21] In State v. Berry, 391 So.2d 406 (La.1980), we affirmed a recommended death sentence in a Jefferson Parish case in which the murderer intentionally killed a deputy sheriff during an aborted bank robbery. And in State v. Johnny Taylor, ___ So.2d ___ (La.1982) (No. 81-KA-2298), decided this day, we affirmed the death sentence in a case in which the murderer lured the victim from his home at night on the pretext of buying the victim's used automobile, stabbed the victim 20 times, and locked him alive in the trunk of the car, where he was left to die.

[22] See State v. Smith, 400 So.2d 587 (La.1981).

[23] See State v. Lindsey, 404 So.2d 466 (La.1981).

[24] State v. Jimmy Robinson, ___ So.2d ___ (La.1982) (No. 81-KA-1801).

As required by our rules, the district attorney has submitted information concerning all first degree murder prosecutions, including a brief description of the offense, the offender, and the disposition. A review of those cases illustrates the adage that no two cases are alike. (A brief description of each is included as part of an unpublished appendix.) In some, offenders, while engaged in robberies or burglaries, killed their victims or others who interrupted the commission of their crimes. In others, offenders killed out of anger at or hatred for the victim. In two cases, women were convicted for their part in schemes to kill their spouses.

The only thing which seems clear from a review of the cases presented to Jefferson Parish jurors is that they appear to recommend death in relatively few cases and only in those of an egregious nature. Certainly this case fits that description. Never before has this court been presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here. After administering a savage beating, defendant sat comfortably listening to records, while his tormented victim lay dying before his eyes. Although defendant attempted to show that Lane was the principal aggressor, the jury obviously credited Ms. Shano's account which placed primary emphasis on defendant's role in Ms. Arwood's excruciatingly painful and lengthy ordeal. The jury obviously believed that he was principally responsible for urging Lane to participate in killing a woman who was virtually a perfect stranger to Lane.

Moreover, the superficial disparity between the sentences imposed on Lane and on defendant quickly disappears when one evaluates the culpability of the two men

in this incident, as well as their individual backgrounds. Neither of the two juries, which separately heard the cases and made the recommendations, acted unreasonably. Two participants in the same murder can easily be viewed very differently for penalty purposes.[25]

This murderer, a mature man of almost 30, was not under the domination of any other human being, nor did he play a minor role in the brutal slaying. Furthermore, unlike Lane, he had previously killed a helpless, weaker human being. His case is easily distinguishable from Lane's.

Defendant's only endeavor to present factors in mitigation was his presentation of his own version of the child's death and his heartrending account of a pitiful, deprived childhood. While the factors were properly considered by the jury and must be considered on appeal, they pale into insignificance when faced with the horrendous offense committed against a helpless young woman.

The value which society places on human life has led the Legislature to enact severe penalties for the unjustified killing of a human being. That same concern for the intrinsic worth of the life of the accused has also

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[25] See, for example, the cases involving the two Sonnier brothers, in which they kidnapped and murdered a young couple after raping the girl. This court eventually affirmed the death sentence for the older brother, who had a serious criminal record. See State v. Sonnier, 402 So.2d 650 (La.1981). However, this court concluded death was excessive for the younger brother, who acted under the influence and domination of his older brother and whose role in their crime was "relatively minor". See State v. Sonnier, 380 So.2d 1 (La.1979).

led courts and legislatures to erect carefully designed procedures which must be scrupulously followed before an accused's life may be taken by the state for his crime.

This court's function in reviewing a death penalty recommendation by a jury is not to sit as a subsequent sentencing panel, but to insure that the jury's recommendation was not influenced by arbitrary factors or improper considerations. The jury in this case was unanimously convinced beyond a reasonable doubt that defendant committed first degree murder and that the circumstances warranted the imposition of the maximum penalty which may be imposed. We are convinced, on review of the record, that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning that recommendation on appeal.

Accordingly, defendant's conviction and sentence are affirmed.

APPENDIX

(Not for Publication)

Cases in Which the Jury Recommended the Death Penalty

The following is a brief synopsis of the first degree murder convictions in which the jury recommended the death penalty.

In State v. Berry, 391 So.2d 406 (La. 1980), defendant was found guilty of first degree murder and sentenced to death upon a finding of three aggravating circumstances:

(1) defendant shot a peace officer who was engaged in his lawful duties at the time he was shot; (2) the murder was committed during an attempted armed robbery of a bank; and (3) the defendant created a risk of death or great bodily harm to more than one person. Defendant was 22 years old at the time of the offense, had a history of drug abuse, and a criminal record consisting of four arrests for nonviolent offenses and a conviction for simple burglary. He was on probation for the burglary charge at the time of the murder. The imposition of the death sentence was affirmed by this court.

In State v. Smith, 400 So.2d 587 (La. 1981), defendant was sentenced to death upon the finding of the single aggravating circumstance that defendant created a risk of death or great bodily injury to more than one person by randomly shooting at a group of boys. Defendant was 16 years old at the time of the offense and had no prior convictions, although he did have a juvenile record. This court remanded the case to the trial court for development of additional facts regarding the existence of the aggravating circumstances.

In State v. Lindsey, 404 So.2d 466 (La. 1981), the defendant was convicted of first degree murder under circumstances suggesting an armed robbery. The death sentence was imposed after the jury found the single aggravating circumstance that defendant created a risk of death or great bodily harm to more than one person. At the time of the offense, defendant was 20 years old with prior convictions for simple burglary and battery. This court reversed the death sentence because of explicit references by the prosecutor and the trial judge to the possibility of a pardon or commutation.

In State v. Taylor, No. 81-KA-2298, defendant was sentenced to death upon the finding of two aggravating circumstances: that the defendant was engaged in the perpetration or attempted perpetration of armed robbery at the time of the murder; and, that the offense was committed in an especially heinous, atrocious, or cruel manner. At the time of the offense, defendant was 28 years old with a prior grand larceny conviction. Defendant stabbed the victim approximately 20 times and placed him in the trunk of a vehicle. The victim bled to death.

Cases in Which the Jury Did Not Recommend the Death Penalty

The following is a brief synopsis of the first degree murder prosecutions resulting in the imposition of a life sentence.

In State v. Love, 410 So.2d 1045 (La. 1982), the defendant shot the victim in the head under circumstances suggesting an armed robbery. The jury recommended life imprisonment.

In State v. Riggins, 388 So.2d 1164 (La.1980), the defendant shot the victim, a 68 year old shopkeeper, four times under circumstances suggesting an armed robbery. The jury recommended life imprisonment.

In State v. Andrews, 369 So.2d 1049 (La. 1979), defendant stabbed the victim to death during a heated argument. The two were competitors in a sandlot football game. The jury recommended life imprisonment.

In State v. Manieri, 378 So.2d 931 (La. 1979), defendant strangled and stabbed the victim, an 11-year old boy, 30 times. The jury recommended life imprisonment.

In State v. Moses and Wilson, 404 So.2d 968 (La. 1981), the two defendants were convicted of first degree murder and sentenced to life imprisonment. The two black defendants fired on a crowd of white males, fatally injuring one of the members of the group. The defendants claimed self-defense. This court reversed and remanded the case based on racial comments made by the prosecutor during closing argument.

In State v. Sharp, ___ So.2d ___ (La.1982), (No. 81-KA-2385), defendant was convicted of two counts of first degree murder and sentenced to life imprisonment. Defendant brutally stabbed his brother-in-law and sister-in-law to death following an argument in their home. The victims bled to death in the presence of their teenage son while waiting for emergency units.

In State v. Shilling, ___ So.2d ___ (La.1982), (No. 82-KA-1820), defendant was convicted of the first degree murder of James Stache. A co-defendant, Billiot, was convicted of second degree murder. The victim had been drinking with the defendant and a co-defendant in a local bar. The men left the bar, accompanied by three females, and Billiot drove to a deserted area. The two defendants and the victim left the car and the defendants started beating the victim. They then began stabbing the victim with their knives, bashing his head against the car, and kicking him. Defendants took the money from the victim's pants and left him for dead. Defendants returned to the scene to look for Shilling's knife and found the

injured victim attempting to hitchhike a ride for help. The defendants forced the victim in the car and drove to a nearby drainage ditch. They then took the victim out of the car, punched him in the throat and Shilling used his knife to slash the victim's throat. Shilling then put the victim's head underwater and joked about the manner in which bubbles were created on the surface.

In State v. Tuckson, 414 So.2d 360 (La.1982), defendant was convicted of first degree murder and sentenced to life imprisonment. The victim observed defendant burglarizing his trunk and attempted to stop him. Defendant fired a gun at the victim and the victim died from a gunshot wound to the heart.

In State v. Goza, ___ So.2d ___ (La.1982) (No. 81-KA-1699), defendant was convicted of first degree murder and sentenced to life imprisonment. Defendant procured someone to kill her husband. She was with her husband when he was shot on Jefferson Highway. Defendant informed the police that a white male wearing a "Groucho Marx" mask had killed her husband while burglarizing their business.

In State v. Dupiere, presently pending on appeal before this court, defendant was convicted of second degree murder and sentenced to life imprisonment. Defendant and a co-defendant, Mangerchine, conspired to commit an armed robbery. The defendants drove to the Model Motel on Jefferson Highway. Defendant Dupiere left the car and went inside. Dupiere ran out of the motel, jumped into the car and informed Mangerchine that he had to shoot the manager. Mangerchine was granted

leniency in exchange for his testimony and received 21 years at hard labor for manslaughter.

In State v. Smith, presently pending on appeal before this court, defendant was convicted of second degree murder and sentenced to life imprisonment. Defendant burglarized the victim's neighbor's home and shot and killed the victim when the victim attempted to apprehend him.

In State v. Parks, (No. 82-KA-0074), defendant was convicted of second degree murder and sentenced to life imprisonment. Defendant and her boyfriend agreed to split the proceeds of any insurance policy on her husband. The boyfriend executed the husband, robbed him of his paychecks and gave the checks to defendant. Defendant cashed the checks the next day.

SUPREME COURT OF LOUISIANA

No. 81-KA-1566

STATE OF LOUISIANA

Versus

ROBERT SAWYER

DIXON, Chief Justice (concurring)

I respectfully concur.

C.Cr.P. 905.2 is ambiguous. We should not interpret it to permit the introduction of "character and propensit[y]" evidence except "according to the rules of evidence." C.Cr.P. 905.2. Here, however, the error of

permitting evidence of bad character before character is placed at issue by defendant was harmless beyond reasonable doubt.

SUPREME COURT OF LOUISIANA

NO. 81-KA-1566

STATE OF LOUISIANA

versus

ROBERT SAWYER

DENNIS, Justice, concurring in the result.

I concur in the result but strenuously disagree with the majority's unabashed disregard of the law and rules of evidence governing capital sentence hearings.

Code of Criminal Procedure article 905.2 clearly provides that "[t]he hearing shall be conducted according to the rules of evidence" and that "[e]vidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue." This plainly indicates that, except for evidence relative to aggravating and mitigating circumstances, the introduction of character evidence is governed by the rules of evidence, including the statutory rules set forth by R.S. 15:479-83. Of these, R.S. 15:481 and 483 are most pertinent here: § 481 "The state is permitted to introduce testimony of the bad character of the accused only in rebuttal of the evidence introduced by him to show good character." § 483 "No other investigation into the character of a witness is permissible except such as affects his

credibility." These rules plainly state that a defendant's character cannot be attacked until he puts it at issue by the introduction of good character evidence or by taking the witness stand. Our law contains also a great many jurisprudential rules, not the least important of which are the rules adopted by this court in State v. Prieur 227 So.2d 126 (La. 1973), to guarantee due process of law and relevance in the introduction of other crimes evidence.

The majority is completely wrong in stating that art. 905.2 does not provide any specific rules regarding the admissibility of evidence at a capital sentence hearing. Art. 905.2 clearly states that the hearing shall be conducted according to the "rules of evidence" which obviously include those laws previously enacted by the legislature and probably emcompass [sic] those rules previously adopted by this court. As any evidence scholar knows, the legislature has not yet enacted a comprehensive evidence code and our body of that law is inadequate and unworkable without the jurisprudentially developed rules.

In truth, the majority has ignored the sentencing procedure enacted by the legislature and is attempting to fashion a procedure more to its liking. Apparently, the majority prefers the procedure that was adopted by Texas as described by the Supreme Court in Jurek v. Texas 428 U.S. 262 (1976). In a Jurek sentence proceeding, the jury is nearly always asked to make a finding on only one question not already answered at the guilt trial. That is, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." See Black, Capital Punishment, the Inevitability of Caprice and Mistake 115 (2d ed.

1981). When this is the crucial question, perhaps a wide-open-no-holds-barred procedure, allowing any and all bad character evidence from the word go, is appropriate. But the Texas Jurek proceeding is quite different from the procedure established by Louisiana law under which the jury must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists, and weigh against it any mitigating circumstances, before it may go on to unanimously recommend a sentence of death. Regardless of which procedure in our personal opinions is wiser, fairer, or more just, this court has no legitimate power to usurp the plenary will of the Legislature and reshape the statutory system according to its own specifications.

I find it quite disturbing also that the majority seeks to support its disregard of the law and rules of evidence by implying that there is no essential difference between a capital sentencing by a jury and a noncapital sentencing by a judge. Is the majority implying that this court considers the solemn protections with which the legislature earnestly has surrounded the imposition of our most severe penalty to be meaningless technicalities? That "many of the usual rules of evidence do not apply" even though the Legislature has said they must? If so, the majority's cavalier attitude toward the law enacted by the Legislature and the extremity and permanence of capital punishment is appalling.

The majority opinion is very unclear as to what "procedural safeguards . . . (such as notice)" will be required in penalty hearings. See p. 16. It is hoped that the majority intends to apply the Prieur guidelines to capital punishment proceedings. It would seem that in the

sentencing phase of a capital case most of all, a defendant is entitled to notice, fairness and due process and should not lose his life because of surprise or the lack of a fair opportunity to meet the evidence against him. Yet, the majority has said in footnote 16 that the "usual prohibition" against other crimes evidence is "not applicable in the penalty phase of a capital trial." Its reference on page 16 to the "*applicable* rules of evidence" is robbed of any meaning by the rest of the opinion which seems dedicated to doing away with rules of evidence in sentencing hearings.

In my opinion, the character of the defendant is not generally at issue ab initio in a capital sentencing hearing. Evidence relevant to an aggravating or mitigating circumstance is admissible throughout the proceeding. Unless it fits within this category, however, bad character evidence, including other crimes evidence, is admissible against the defendant only according to the rules of evidence. The opening sentence of C.Cr.P. art 905.2, which states that the sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender does not vitiate the meaning of the great number of detailed provisions which follow it. "Focus," when used as a verb means to concentrate or to converge. The introductory statement that the hearing shall concentrate on the defendant's character among other matters is not equivalent to saying that all character evidence shall be admissible. The remaining provisions of Art. 905.2 et seq. tell exactly how the hearing shall focus or concentrate on its subjects, and basically that is by

following the rules of evidence, except that the introduction of all evidence relevant to aggravating or mitigating circumstances is permitted.

Additionally, I do not consider myself bound by any of the footnotes in the majority opinion. *Footnotes numbers 12* and *13* particularly appear to be entirely unnecessary and seem to reach out to decide issues not before us. The statement that the finding of guilt "automatically" constitutes a finding of an aggravating circumstance in the penalty hearing is contrary to law. The jury must independently find at least one aggravating circumstance *during the sentence hearing* before it may consider the death penalty. C.Cr.P. art 905.3. The elliptic statements regarding Zant v. Stephens, 102 S.Ct. 1855 (1982), and its possible relationship to our law are unclear, unwise, and unnecessary. *Footnote Number 16* is an outright perversion of the law. It flatly states that the prohibition against other crimes evidence is not applicable in a penalty phase. Again, C.Cr.P. art. 905.2 clearly indicates to the contrary. It says that evidence relative to aggravating and mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue, which clearly indicates that outside this exception, the state cannot introduce such evidence until the defendant places his character or credibility at issue "according to the rules of evidence." *Id.*

Nonetheless, I concur in the result. I agree with the Chief Justice that the errors in introducing the bad character evidence were harmless beyond a reasonable doubt. I also concur only in the result for the additional reasons that I find the conviction of guilt to be supportable on a different basis than the majority and consider that

another error in the penalty phase was also harmless error.

The first degree murder conviction is justified by the evidence which in my opinion proves that the defendant was a principal to the perpetration of aggravated rape during the criminal transaction.

The death penalty is warranted because the offense was committed in an especially heinous, atrocious, or cruel manner. Although I am uncertain that the evidence supports a finding that the offender was engaged in the perpetration of aggravated arson, and I am troubled by the jury's failure to find the perpetration or attempted perpetration of aggravated rape as an aggravating circumstance, I ultimately conclude that any error committed by the jury during the penalty hearing was harmless. This crime was so horrible and involved such pitiless and needless torture of the victim that I am convinced beyond a reasonable doubt that the jury would have recommended the death penalty even if it had been informed that the evidence was insufficient to justify findings that the offender was engaged in the perpetration of aggravated arson or had previously been convicted of an unrelated murder.

I agree with the majority's statement at p. 22 of its opinion that this court does not sit as a subsequent sentencing panel. But a word of caution is necessary. By this, we do not mean that we have abandoned our consitutional [sic] function of reviewing death sentences to see if they constitute cruel, unusual or excessive punishment under the circumstances of the case. What is meant is that

we do not formulate or impose sentences; we either affirm them or reverse them.

* * *

STATE of Louisiana

v.

Robert SAWYER.

No. 81-KA-1566

Supreme Court of Louisiana.

Feb. 10, 1983

In re: Robert Sawyer, applying for Stay of Execution, Parish of Jefferson, No. 79-2841.

ORDER

The foregoing motion considered:

IT IS ORDERED that Execution of Robert Sawyer by the State of Louisiana, the Department of Corrections, and any other Department, agent or servant of the State of Louisiana, presently set for March 8, 1983, be and the same is hereby stayed pending the timely filing and disposition of a petition for a writ of certiorari.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

July 6, 1983

Mr. William C. Credo III
District Attorney
Courthouse Annex, 5th Floor
Gretna, LA 70053

Re: Robert Sawyer,
v. Louisiana
No. 82-6263

Dear Mr. Credo:

The Court today entered the following order in the above entitled case:

The motion for Leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Louisiana for further consideration in light of Zant v. Stephens, 462 U.S. ___ (1983).

Very truly yours,

Alexander L. Stevas, Clerk
/s/ Alexander L. Stevas

NOV 28 1983

SUPREME COURT OF LOUISIANA

NO. 81-KA-1566

ROBERT SAWYER

versus

STATE OF LOUISIANA

On Remand from the
United States Supreme Court

BLANCHE, Justice

Defendant was convicted of first degree murder and subsequently sentenced to death. The conviction and sentence were affirmed in State v. Sawyer, 422 So.2d 95 (La. 1982). Defendant applied for a writ of certiorari to the United States Supreme Court, on the ground that evidence of another crime not considered a statutory aggravating circumstance was admitted at the sentencing, thereby injecting an arbitrary factor into the jury's decision making process. The Supreme Court remanded the case to this court for consideration in light of the holding in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983).

FACTS

The gruesome and depraved facts surrounding this case were given a thorough treatment in the court's previous opinion. See Sawyer, 422 So.2d 95 (La. 1983). Therefore, we give only a brief recitation of the circumstances leading to defendant's conviction. On September 29, 1979, Fran Arwood was at the residence of Defendant, where

she was helping to care for the young children of defendant's live-in girlfriend. Defendant and a friend, Charles Lane, attacked Ms. Arwood, striking her repeatedly in the face. Thereafter, the two men proceeded to torture the victim by first dunking her body into scalding water, then beating her and ultimately setting fire to the victim's genitalia with lighter fluid. The testimony of Ms. Shano at trial also indicated that, at some stage the victim was raped. After this savage attack, defendant and Lane left the mortally wounded victim on the floor of the house until relatives of Ms. Shano arrived later in the day.

Both defendant and Lane were indicted for first degree murder. Lane was tried separately and sentenced to life imprisonment. State v. Lane, 414 So.2d 1223 (La. 1982). Defendant was convicted by a unanimous jury, which then proceeded to sentence defendant to death.

At the sentencing hearing, the State reoffered evidence presented in its case in chief to establish that defendant had murdered the victim while in the perpetration of aggravated arson and aggravated rape, and that defendant had murdered the victim in an unusually cruel manner. Additionally, the State called a deputy prosecutor from Arkansas, who introduced documentary evidence that defendant had pled guilty to involuntary manslaughter of a four-year old child, and had served one year in prison as a result. Afterwards, defendant testified about the guilty plea and his version of the event leading to the child's death. Both defendant and his sister offered mitigating testimony as to defendant's brutal childhood and one time institutionalization at a state mental health facility.

Upon hearing all the evidence, the jury announced its finding of three statutory aggravating circumstances: (1) that defendant was engaged in the perpetration of aggravated arson; (2) that the offense was committed in an especially heinous, atrocious and cruel manner; (3) that defendant was previously convicted of an unrelated murder and sentenced defendant to death. On appeal, this court found that the last aggravating circumstance was not supported by the evidence, 422 So.2d at 101, but correctly observed that only one aggravating circumstance need be found in order to place defendant in the category of offenders capable of receiving the death penalty. Defendant, however, argued that introduction of testimony relating to the manslaughter plea was improper, since it was neither admissible as an aggravating circumstance in the guilt phase of the trial, nor as other crimes evidence in the sentencing phase where defendant had not previously placed his character at issue. In upholding the admission of the testimony, this court found that Louisiana C.Cr.P. art. 905.2 allowed the evidence to be considered to show defendant's bad character, reasoning that defendant's character is put at issue by the nature of the proceeding, regardless of whether he takes the witness stand on his own behalf and places his character at issue.

ISSUE

On remand, we are asked to consider our previous holding in light of Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). In that case, the U.S. Supreme Court affirmed

the constitutionality of a Georgia sentencing statute, finding that the invalidity of several aggravating circumstances found by the jury did not impair the death sentence in the case. Based upon our reading of Zant, we frame the following issues for resolution: (1) Under the Louisiana statutory scheme, does the finding of an additional aggravating circumstance that is later found invalid have any affect [sic] on the jury's sentence determination, where evidence of the invalid circumstance was otherwise admissible? (2) Was evidence of the invalid aggravating circumstance admissible in the instant case to show defendant's character, where defendant had not first placed his character at issue? (3) If inadmissible, was the evidence so consequential that it injected an arbitrary factor in the jury's decision to sentence defendant to death?

THE STATUTORY SCHEME

Louisiana's capital sentencing procedure. La. C.Cr.P. art. 905-905.9, is similar in many respects to the Georgia procedure examined in Zant.[1] As in Georgia, the trial of

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[1] The Georgia sentencing procedure was explained in detail by the Georgia Supreme Court in response to the U.S. Supreme Court's certified question in Zant, 250 Ga. 97, 297 S.E.2d 1 (1982). Essentially, the Georgia System is divided into three planes:

I. Ga. Code Ann. §26-1101 separates those homicide cases which fall into the category of murder. This is an issue of fact determined during the guilt phase of the trial.

(Continued on following page)

an individual charged with first degree murder is bifurcated; consisting of a guilt phase and a penalty phase. During the guilt phase of the trial, the jury must make the initial determination whether the defendant belongs in the class of offenders who *may* be exposed to the death penalty. La. R.S. 14:30 provides that in addition to specific intent to kill a human being, the offense must include one of four aggravating circumstances.[2] Once the defendant has been found guilty, the jury must then determine whether defendant will be given the death sentence.

(Continued from previous page)

II. Ga. Code Ann. §27-2534.1 provides that unless at least one aggravating circumstance is found, the death penalty may not be imposed in a given murder case.

III. Once it is determined that the death penalty may be imposed, the fact finder determines whether it shall be imposed. This determination takes into account all relevant evidence in mitigation or aggravation, and vests absolute discretion on the fact finder.

Superimposed on this scheme is the automatic appeal to the Georgia Supreme Court, who determines whether the penalty was imposed under the influence of passion, prejudice or other arbitrary factors.

[2] La. R.S. 14:30 states:

First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration of attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(Continued on following page)

The process of sentencing is explained in Code of Criminal Procedure Art. 905.3, which states:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one statutory aggravating circumstance exists*, and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

Clearly, then, the sentencing phase is itself broken down into two aspects. Initially, the jury must find the existence of at least one statutory aggravating circumstances before an offender can be sentenced to death. Because the aggravating circumstances listed in Article 905.4 include most of the aggravating circumstances listed in R.S. 14:30, the jury will usually have already found at least one aggravating circumstance before it reaches the penalty phase of the trial. Louisiana's scheme differs from Georgis's [sic] in this respect, for the class of offenders in Louisiana

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(Continued from previous page)

> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
>
> (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

eligible for the death penalty is considerably narrower after the guilt phase of the trial.[3]

Once a *single* aggravating circumstance is found, the jury may then consider all the evidence, both in aggravation and mitigation, in order to make the final determination that the offender should be put to death. The finding of additional aggravating circumstances are therefore unnecessary to advance the case to consideration of whether the death penalty will in fact be imposed. Nothing in the statutory scheme requires that the jury weigh two or more aggravating circumstances more heavily

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[3] Under Ga. Code Ann., murder punishable by death is defined in the following manner:

> §26-1101 Murder
>
> (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of a human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Clearly, then what is considered second degree murder in Louisiana would be considered murder in Georgia, subject to the death penalty.

against the defendant than a single aggravating circumstance. Rather, the finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process can be undertaken.[4]

ADMISSIBILITY OF THE EVIDENCE

While the failure of an aggravating circumstance may not of itself impair the sentence, the introduction of otherwise inadmissible evidence in support of the circumstance could inject an arbitrary factor in the sentencing process. Defendant maintains in the instant case that inadmissible evidence was put before the jury in the form of testimony of the involuntary manslaughter conviction.

Defendant's argument is based on the language of C.Cr.P. art. 905.2, which addresses the conduction of sentencing hearings. The article provides:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. *The hearing*

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[4] Additional protection is afforded defendant by Rule 28 of the Louisiana Supreme Court, which provides for automatic review by this court to determine if the sentence is excessive. Included in this review are inquiries into whether:

(1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; and

(2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and

(3) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant

> *shall be conducted according to the rules of evidence.* Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Defendant contends that the second sentence of 905.2 precludes the introduction of other crimes evidence unless offered to show defendant's bad character, or to support a valid aggravating circumstance.[5] 905.4(c) limits

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[5] Article 905.4 provides that:

> The following shall be considered aggravating circumstances:
>
> (a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;
>
> (b) the victim was a fireman or peace officer engaged in his lawful duties;
>
> (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;
>
> (d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(Continued on following page)

other crimes which may be considered aggravating circumstances to convictions of unrelated murders, aggravated rape, or aggravated kidnapping, or where the offender has a significant prior history of criminal activity. It does not include guilty pleas, or for that matter, convictions of involuntary manslaughter.[6] Accordingly, defendant argues that he has not placed his character at issue by taking the stand, evidence of the guilty plea

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(Continued from previous page)

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witnesses [sic] in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

[6] See State v. Antonio James, ___ So.2d ___ (La. 1983) (Blanche, J., concurring in part and dissenting in part).

cannot be introduced. As further support for this proposition, defendant points to the following sentence of 905.2 – which allows for other crimes evidence to be introduced regardless of whether defendant has taken the stand if it relates to the aggravating circumstances – as a limited exception to the general rules of evidence by which the hearing should be guided.

This argument was espoused by defendant when the case was originally before this court, State v. Sawyer, 422 So.2d 95 (La. 1982). We rejected the argument then, and most recently, in the case of State v. Jordan, ___ So.2d ___ (La. 1983).[7] Now, after having been asked to reconsider the question, we affirm our prior holdings.

The first sentence of 905.2, which defendant ignores in his effort to expand the meaning of the second sentence, expresses the true intent of the statutory scheme. When it commands that the sentencing hearing focus on the "circumstances of the offense and the *character*[8] and propensities of the offender," 905.2 makes it clear that the character of the defndant [sic] is one of the two most relevant factors with which the sentencing hearing should be concerned. As we observed in State V. Matheson:

> The above article clearly provides that the focus of the sentencing hearing is on "the character and propensities of the offender" as well as the

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[7] The opinion was authored by Judge Julian Bailes, sitting for Justice Marcus.

[8] Emphasis added.

> circumstances of the offense and that evidence of "aggravating or mitigating circumstances" are relevant *irrespective* of whether defendant places his character at issue.

407 So.2d 1150, 1164 (La. 1981) In State v. Jordan, we stated that "it is axiomatic that the conviction per se puts the convicted offender's character at issue" ___ So.2d ___, ___ (La. 1983). At the heart of such a statement rests the underlying difference between the uses of character evidence at the guilt and sentencing phases of a trial. The rules of evidence prohibit the use of character evidence where defendant has not placed his character at issue for the simple reason that such evidence is not relevant to the issue of guilt. To the contrary, in a sentencing hearing, the jury is asked to scrutinize defendant's character, to ascertain whether the offender and the offense fit the statutory scheme for those whom the death penalty has been designed.

We are of the opinion that the reference to the rules of evidence contained in Article 905.2 was placed there to regulate the introduction of competent versus incompetent evidence, and should not be construed to prohibit introduction of highly relevant character evidence at the sentencing hearing.[9] Thus, we conclude that the evidence

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[9] In a concurring opinion to Jordan, J. Lemmon noted the absurd result of applying the other crimes rule to a sentencing hearing:

> "It is therefore highly doubtful that the Legislature intended for the defendant to control the

(Continued on following page)

of defendant's guilty plea to involuntary manslaughter of a four-year old child was properly admitted to show defendant's character.

ARBITRARINESS

Although we find that the evidence was admissible under Article 905.2, and thus injected no arbitrary factor into the decision process of the jury, we think that even if the evidence had been inadmissible, no serious prejudice could have resulted to defendant. Defendant has argued strenuously in his brief that the prosecutor relied heavily on the details surrounding defendant's guilty plea to manslaughter to convince the jury to return a death sentence. Regardless of whatever emphasis the prosecutor placed on the guilty plea, it is inconceivable, given the overwhelming evidence of the heinous nature of the principal offense already before the jury, that the additional evidence of the manslaughter plea could have seriously prejudiced defendant at that point.

DECREE

For the reasons assigned, we find that the failure of one of three statutory aggravating circumstances did not create an arbitrary factor in the sentencing of defendant

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(Continued from previous page)

> decision on which evidence of his character and propensities will be introduced at the penalty hearing. Yet this is exactly what the adoption of defendant's argument would permit." State v. Jordan, ___ So.2d ___, at ___ (La. 1983) (Lemmon, J., concurring).

by allowing inadmissible evidence to be considered by the jury. Therefore, the sentence of defendant is affirmed.

AFFIRMED

SUPREME COURT OF THE UNITED STATES

No. 83-6258

Robert Sawyer,

Petitioner

v.

Louisiana

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Louisiana, No. 81-KA-1566.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Louisiana.

IT IS ORDERED by this Court that the said petition be, and the same if hereby, denied.

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the United States
By Illegible
Chief Deputy

April 2, 1984

Justice Brenran and Justice Marshall dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

STATE OF LOUISIANA,
PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana	No. 79-2841
VS.	Division G
ROBERT SAWYER	Date 5-8-84

DISTRICT ATTORNEY _____ JUDGE TIEMANN

PETITION FOR WRIT OF HABEAS CORPUS IN ACCORDANCE WITH LOUISIANA SUPREME COURT RULE XXVII WAS FILED IN OPEN COURT. HAVING EXAMINED THE FOREGOING PETITION FOR POST-CONVICTION RELIEF, WRIT OF HABEAS CORPUS, EVIDENTIARY HEARING AND STAY OF EXECUTION, THE COURT DENIED THE PETITION AND STAY OF EXECUTION.

/s/ Kathy Wright
DEPUTY CLERK

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA
EX REL ROBERT SAWYER

VS

ROSS MAGGIO, JR.,
WARDEN LOUISIANA STATE
PENITIENTIARY (sic)

NUMBER
84-KP-0919

In Re: ROBERT SAWYER, applying for Writ of Review and Stay of Execution to the Twenty-Fourth Judicial District Court, Parish of Jefferson, Number 79-2841, Division G.

May 10, 1984

In view of the fact that counsel assigned by the trial judge in this capital case was not admitted to the bar for at least five years prior to trial as required by La. Code Crim. P. art. 512 and considering defendant's contentions relative to ineffective assistance of counsel, we grant the application, stay the execution and remand the case to the district court with instructions to the trial judge to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence.

/s/ WFM
/s/ JAD
/s/ PFC
/s/ JLD

/s/ FAB

/s/ JCW

/s/ HTL

Supreme Court of Louisiana
May 10, 1984

/s/ Illegible
Clerk of Court
For the Court

STATE OF LOUISIANA	24TH JUDICIAL DISTRICT COURT STATE OF LOUISIANA PARISH OF JEFFERSON
VERSUS	NO. 79-2841,
ROBERT SAWYER	DIVISION "G"

FILED: _____, 1985

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DEPUTY CLERK

JUDGMENT

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 8th day of February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

STATE OF LOUISIANA	*	24TH JUDICIAL DISTRICT COURT STATE OF LOUISIANA PARISH OF JEFFERSON NO. 79-2841, DIVISION "G"
VERSUS	*	
ROBERT SAWYER	*	

FILED: _____, 1985

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DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came for hearing pursuant to a remand from the Louisiana Supreme Court to determine the effect of a violation of C.Cr.P. Art. 512, the claims of ineffective assistance of counsel, and the defendant's (petitioner's) entire application for Writ of Habeas Corpus. Of the twenty (20) claims asserted by petitioner, the Court finds that several of these claims are overlapping, and therefore, will address them by substantive issue presented therein.

Claim 1

DENIAL OF DUE PROCESS AND EQUAL PROTECTION CONSTITUTIONAL RIGHTS BY APPOINTED COUNSEL WHO HAD BEEN ADMITTED TO THE BAR FOR LESS THAN FIVE (5) YEARS (*C.Cr.P. Article 512*)

The record reflects that Robert W. Sawyer, petitioner herein, was indicted for First-Degree Murder on December 7, 1979, and was arraigned on January 24, 1980. At the arraignment, the Honorable Charles Gaudin appointed Wiley Beevers to represent Sawyer, who entered a plea of not guilty. Mr. Beevers had, at the time of the arraignment, more than five (5) years experience at the bar. James Weidner was also appointed by the Court to assist Mr. Beevers. It has been stipulated that Mr. Weidner did not have five (5) years experience at bar at the time of his appointment. Mr. Beevers later withdrew, and Mr. Weidner was reappointed on March 27, 1980, as sole counsel of record. Prior to trial, Mr. Weidner engaged the services of Sam Stephens, an attorney who was two (2) weeks short of the five (5) years requirement contained in C.Cr.P. Art. 512, which states:

> *When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleas to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned an assistant counsel.*

Sawyer was convicted of First-Degree Murder by a jury of twelve (12) on September 19, 1980. On that same

day, the jury recommended the death penalty. For a recitation of the facts, see *State v. Sawyer*, 422 So.2d 95 (La. 1982).

The issue before this Court is whether or not Sawyer's conviction should be reversed based on the technical violation of C.Cr.P. Art. 512. Irrespective of petitioner's contention that the mere violation of this article constitutes a denial of due process and equal protection of the laws, and therefore should require a reversal, this Court is of the opinion that the legislative intent of Article 512 was to insure *effective assistance* of counsel to a defendant charged with a capital offense. Article 512 was designed, in this Court's opinion, as a safeguard against inexperienced counsel representing a defendant charged with such a serious offense. A violation of Article 512 could be viewed as a rebuttable presumption that the indigent defendant was not provided with effective assistance of counsel. However, this presumption could be rebutted upon a showing that appointed counsel rendered effective assistance. The purpose of Article 512 would, therefore, be met when such a defendant, *in fact*, is represented by experienced counsel even though that attorney has slightly less than the requisite five (5) years admission to the bar. In this Court's opinion, the legislature suggested that competence occurs with five (5) years admission. Where competence is shown to exist, suggestion must give way to reality. In the instant case, the technical mandate of Article 512 was fulfilled when Wiley Beevers, an attorney who at the time of the time of [sic] arraignment had considerably more than five (5) years admission to the bar, was appointed as chief counsel to represent Sawyer. In accordance with said Article, James

Weidner was appointed by the Court to assist Mr. Beevers. Thus, the genuine issue in this case is whether or not Mr. Weidner actually rendered effective assistance of counsel to Robert Sawyer. This issue will be more fully discussed under petitioner's Claim II. However, pretermitting this issue, respondents allege that the technical violation of Article 512 is, at most, harmless error. According to La. C.Cr.P. Article 912, *"a judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."* The burden of proving harmless error rests upon someone other than the person prejudiced by it to show that it was harmless. See *State v. Gibson*, 391 So.2d 421 (La. 1980). Thus, respondents herein must prove that the trial court's failure to appoint counsel with five (5) years admission to the bar created little likelihood that such an error would have changed the results reached by the jury. See *State v. Ferdinand*, 441 So. 2d 1272 (La. App. 1 Cir., 1983), writ denied 445 So.2d 1233. Additionally, the United States Supreme Court held in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) that some consitutional [sic] errors may be considered harmless if the beneficiary of the error *"prove(s) beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id.*, 386 U.S. 24, 87 S.Ct. 828. After reviewing seven (7) volumes of transcripts and the record, this Court is of the opinion that the error complained of did not constitute a substantial violation of petitioner's constitutional or statutory rights, and that respondents proved, beyond a reasonable doubt, that such an error was not a contributory factor to the verdict reached. As stated in *State v. McLeod*, 6 So.2d 145

(La. 1942), *"while the accused is entitled to be protected against an invasion of rights guaranteed by the Constitution, these rights may not be employed on a pretext as a shield to thwart the process of justice." Id.* at 148. As previously stated, the better inquiry is whether or not the appointed attorney, James Weidner, in fact, rendered effective assistance of counsel, which is to be examined and discussed *infra*.

As regarding petitioner's argument that there was a denial or violation of his constitutional rights to due process and equal protection, the parties have stipulated that as of August 14, 1984, the 39 Louisiana inmates on death row (other than the petitioner) were provided with appointed counsel who had the requisite five (5) years admission to the bar. Petitioner contends that based on the language contained in *Bearden v. Georgia*, ___ U.S. ___, 103 S.Ct. 2064 (1983), citing *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 2031 (1970), certain factors must be examined and weighed in order to determine if a violation of equal protection or due process exists:

(1) the nature of the individual interest affected;

(2) the extent to which it is affected;

(3) the rationality of the connection between legislative means and purpose; and

(4) the existence of alternative means for effectuating the purpose.

It should be noted that the petitioner is not attacking Article 512 as being unconstitutional; rather, he is asserting that the trial court did not apply Article 512 in such a manner as to provide petitioner with due process and

equal protection of the laws, *i.e.*, by the trial court's failure to appoint counsel with the requisite five (5) years admission to the bar.

With regard to the first element, petitioner's interest consisted of having effective counsel defend his constitutional rights in accordance with the standard espoused by the United States Supreme Court in *Strickland v. Washington*, ___ U.S. ___ 104 S.Ct. 2052 (1984), to be discussed in Claim II. The extent to which petitioner's interest was affected was, in this Court's opinion, not grave or serious enough to warrant a reversal of his conviction for the main reason that, notwithstanding his lack of five (5) years admission to the bar, Mr. Weidner rendered effective assistance of counsel. The reasons for this decision will be provided *infra*. With respect to the rational relation between the State's interest in prosecuting the petitioner in an efficacious manner and the means employed to effectuate their purpose, this Court finds that the trial court's failure to satisfy the mandate of Article 512 does not outweigh the State's interest in protecting society and seeking justice. Lastly, this Court acknowledges that alternative means were available to the trial court, namely, appointing counsel who had been admitted to the bar for five (5) or more years.

In weighing the aforementioned factors in compliance with *Bearden, supra*, this Court is of the opinion that whatever harm, if any, that occurred to petitioner as a result of the trial court's failure to adhere to Article 512, in its entirety, the State's interest in trying the petitioner on behalf of the residents of Louisiana clearly preponderates in favor of not finding a violation of petitioner's due process or equal protection rights.

Claim II

INEFFECTIVE ASSISTANCE OF COUNSEL

By agreement between the State and the petitioner, this issue was submitted on the record, affidavits, stipulations Habeas Corpus petition and its accompanying affidavits.

The leading case for a claim for ineffective assistance of counsel in [sic] *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984). As succinctly stated by the United States Supreme Court:

> *(a) convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unrealiable [sic].*

Id., at ___, 104 S.Ct. at 2054. The Court further indicated that where the defendant fails to demonstrate prejudice, the alleged deficiencies in counsel's performance need not even be considered. According to *Strickland, supra*, *"if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."* *Id.*, at ___, 104 S.Ct. at 2070. The standard for attorney performance remains simply "reasonableness" under prevailing professional norms. Thus, based on the holding in *Strickland, supra*, a convicted defendant complaining of ineffective assistance of counsel has the burden of showing that *"counsel's representation fell below an objective standard of reasonableness."* *Id.*, at 104 S.Ct. at 2065.

Petitioner sets forth several grounds to support his claim that his trial counsel rendered ineffective assistance which can be grouped together:

(1) *Failure to Interview Various Potential Witnesses.*

It was held in *Murray v. Maggio*, 736 F.2d 279 (5 Cir. 1984), that *"complaints of uncalled witnesses are not favored in federal habeas review . . . , and the (defendant) must overcome a strong presumption that (counsel's) decision in not calling . . . a witness was a strategic one."* *Id.*, at 282. This Court is of the opinion that given the strength of the State's case, it was probably strategic on the part of counsel not to call other witnesses who might have made inconsistent statements which would have damaged the defendant's case. Furthermore, under the standard in *Strickland, supra*, hindsight is not considered in testing the reasonableness of counsel's performance. Therefore, petitioner has not demonstrated deficient performance which prejudiced his defense.

(2) *Failure of Counsel to Allow the Venire to be Informed of the Penalties for the Lesser Included Offenses of Second Degree Murder and Manslaughter.*

As stated previously, much deference is given to the strategy of counsel in preparing his defense. This Court can only speculate as to the reasons Mr. Weidner objected to the prosecutor's attempt to inform the venire of penalties for lesser included offenses. Nevertheless, petitioner has failed to show deficient performance on the part of counsel.

(3) *Ineffective Representation at the Voir Dire Stage.*

In reviewing the transcript of the voir dire examination, it is the opinion of this Court that an attorney's intuition must be given respect when he examines potential jurors. It is common knowledge among the legal profession that "intuitive" feelings of the attorney play a large role as to whom he selects as a juror. This Court must label jury selection as "strategy" on the part of counsel, and hold that petitioner has not proven that Mr. Weidner's conduct was not one of strategy.

(4) *Waiver of Closing Argument During Guilt/Innocence Phase.*

It is the opinion of this Court that Mr. Weidner's choice in not giving closing arguments falls within the zone of strategy. *William v. Beto*, 354 F.2d 698, 703 (5 Cir. 1965).

(5) *Failure to Investigate Character and Expert Witnesses as it Related to the Defense of Intoxication and Penalty Phase.*

Petitioner alleges that Mr. Weidner chose only to call three (3) character witnesses at the penalty phase, and therefore, prejudiced his chances of mitigation. This Court opines that Mr. Weidner's strategy in not calling more witnesses to attest to the character of the petitioner was probably to the latter inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in *Larsen v. Maggio*, 736 F.2d 215 (5 Cir. 1984):

> *(r)epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.*

Id., at 217. Thus, petitioner has failed to show that he was prejudiced. Petitioner further contends that the two psychiatrists called with regard to the intoxication defense were not offered by Mr. Weidner as experts in the field of alcoholism. A review of the transcripts show that both doctors were given hypothetical questions to a situation where an individual consumes a considerable amount of alcohol, and then commits the acts of which petitioner was accused. The opinion of one psychiatrist was that the person was suffering from a toxic psychosis secondary to alcohol. The other psychiatrist testified on direct that the petitioner probably had a sociopathic personality. It is the opinion of this Court that Mr. Weidner's examination was both effective and meaningful considering the strength of the State's case, and that any errors he may have committed with regard to his examination was not sufficient to prejudice the petitioner's defense.

(6) *Failure of Counsel to Inform Defendant of his Right to Testify.*

Petitioner's Claim III, concerning his denial of the right to decide whether or not to testify, will be addressed here insofar as it bears on the issue in ineffective assistance of counsel. After reviewing the record, affidavits and stipulations, this Court finds no evidence whatsoever to support petitioner's allegation that he was not informed by counsel of his right to testify. Therefore, this claim is without merit.

(7) *Failure of Counsel to Object to Remarks Made by the Prosecutor not in Evidence.*

Even should this omission by counsel be considered as unreasonable or below the standard enunciated in *Strickland, supra,* petitioner has failed to prove prejudice sufficient to undermine the confidence in the outcome.

In light of the *Strickland, supra,* holding, petitioner did not meet his burden of proving that counsel's performance was deficient, and that such performance prejudiced the petitioner so seriously that he was deprived of a fair trial. In summary, petitioner has failed to show a reasonable probability that, but for the alleged errors committed by his trial counsel, the jury would have had a reasonable doubt respecting his guilt. *Murray v. Maggio,* 736 F.2d 279 (5 Cir. 1984). This Court notes that not only was Mr. Weidner's representation "reasonable" given the totality of the circumstances, he demonstrated a remarkable ability to defend his client in light of the enormous

amount of evidence in the hands of the prosecution. Truly, he demonstrated wisdom beyond his years.

Claim III

FAILURE OF THE COUNSEL TO INFORM PETITIONER OF HIS RIGHT TO TESTIFY

This issue was addressed under Claim II(6), *supra.*

Claims IV - XX

In his petition for habeas corpus, petitioner also claims that his conviction, or in the alternative, his death sentence, should be vacated because of a host of other errors. This Court has exhaustively studied the record, the transcripts, affidavits and stipulations in connection with petitioner's claims, and believes that those other claims are so seriously lacking in merit that no reasonable jurist could come to a conclusion that is different from the conclusion reached by the Louisiana Supreme Court. *Barefoot v. Estelle,* ___ U.S. ___, 103 S.Ct. 3383, *reh. den.* 104 S.Ct. 209 (1983). As to these other claims, petitioner has not made a substantial showing of the denial of a constitutional right, recognized by either the State or Federal Constitution. Accordingly, all of petitioner's remaining claims are rejected by this Court.

For the reasons stated hereinabove, petitioner's claims for post-conviction habeas corpus relief are denied.

GRETNA, LOUISIANA, THIS 8th DAY OF February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

STATE OF LOUISIANA	24TH JUDICIAL DISTRICT COURT STATE OF LOUISIANA PARISH OF JEFFERSON
VERSUS	NO. 79-2841,
ROBERT SAWYER	DIVISION "G"

FILED: _____, 1985

_____
DEPUTY CLERK

JUDGMENT

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 8th day of February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
/s/ Kathy Wazda
DEPUTY CLERK

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA
EX REL
ROBERT SAWYER NO. 85-KP- 0660

VS.

ROSS MAGGIO, JR.,
WARDEN,
LOUISIANA STATE
PENITENTIARY

IN RE: Sawyer, Robert; Applying for Supervisory Writs & Habeas Corpus; Parish of Jefferson 24th Judicial District Court Div. "G" Number 79-2841

May 13, 1985

Granted with Per Curiam. (Attached)

JLD

JAD

PFC

JCW

LEMMON, J., concurs. This Court's determination of relator's claim may turn on evidence regarding defense counsel's waiver of closing argument during the guilt phase.

Supreme Court of Louisiana
May 13, 1985

/s/ Illegible
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 85-KP-0660 May 14, 1985

STATE EX REL ROBERT SAWYER

versus

ROSS MAGGIO, JR., WARDEN,
LOUISIANA STATE PENITENTIARY

PER CURIAM.

In our previous order we instructed the district court to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence. The parties and the district court misconstrued our order of an evidentiary hearing as being limited to the issue of whether counsel was ineffective because he had not been admitted to the bar for at least five years. Our concerns were not so limited, however, and we now remand the case for an evidentiary hearing on all of the defendant's allegations of ineffective assistance of counsel during the preparation, trial and penalty phase of his case.

WRIT GRANTED; CASE REMANDED FOR EVIDENTIARY HEARING.

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* * *

[186] THE COURT:

What I don't want to do is have to go through and cause again the Supreme Court to go that extra, they are burdened enough. I really think I'm going to let the ruling stay, and let's do that. Follow your suggestion. We'll not tamper with the stay order. We will deny the petition. That way, if they say well, I went beyond what they intended, so be it, certainly all right. But if I did not rule, and they say, "Well, we are waiting on a ruling from the trial court." Then there would be a further unduly delay. So, the ruling is that the petition is denied.

MR. CREDO:

Does the Court wish to dictate its reasons for the denial into the record?

THE COURT:

[187] What I would like to do is – again, the reasons are similar to what was reasoned earlier in the written reasons for the denial. I am as convinced as ever, in some areas even more convinced, having heard the statements and testimony of witnesses that what we had in this case, which Mr. James Weidner of this Parish defended Mr. Robert Sawyer, that we had a mature and reasoned, and in some ways seasoned certainly beyond his physical years, for the defense of this gentleman.

Was the defense successful, of course, it was not. I mean that is obvious. We wouldn't be here today if it was successful. He would be free somewhere in Tennessee, or somewhere else.

Was it lacking? Someone once said, you know, "Even Homer nods", which means that he fell asleep

one night and didn't complete a paragraph, or a sentence, or left a dangling participle. This is an imperfect world.

We had a man who is an acknowledged and accepted expert saying, "I would have done this differently, but there are exceptions in each rule."

I am as convinced as ever, as I say in some areas more convinced, maybe I did detect, shall I call it a weakness in the defense that I was not privy to, or aware of before, but on [188] balance, on balance I cannot imagine a better defense. Would it have been different? Of course, we all do things differently.

Mr. Weidner's testimony, for example, as to why he chose not to give that closing argument, it was reasoned and well reasoned out. The question here is was the defense adequate? He said he was very familiar with the trial tactics of Mr. Boudousque. It has been alleged that certain law enforcement officers have good guy and bad guy type things. One guy strenuously interrogates, and when he leaves, the defendant, or the person being questioned, is breathless and afraid. Another officer comes in and says "Hi, how are you doing?" He says "How am I doing?" He says "That man just threatened to take my head off with his left foot." That is – "You got to be joking, that is a mean thing to do. Tell me all about it."

Apparently, this was thought to be the tactic of Mr. Boudousque. "Hi, ladies and gentlemen, we're here today. We have five elements. I think I have got them all. Well, that is about it. Thank you so much." And then when the defense lawyer gets up and says this, this, and this, then he says, "This is preposterous, I can't stand the quiet no longer", and just thunder away. I'm just conjecturing because I have never been in a case with Mr. [189] Boudousque.

But my point is that these things were not done in a cavalier fashion, not done without some reasoning. In fact, it was charming in a good sense of that term, that Mr. Weidner stated, and I'm sure just a small amount of blushing, that he practices his speech in front of his bath room mirror. He had apparently, and this Court feels, a feeling of, how shall I say it, it's a dedication I guess is the term I am searching for, to this cause. He was espousing at the time, namely, the proper and best defense he could to Mr. Sawyer.

It's interesting, and I note this again, I guess it's a question of style. Mr. Beevers was so convinced that the man had little or no chance to succeed at a trial on the matter, that he sought additional help from a man more wise in his experience, by his own admission, he said "Go to the defendant and beg and plead with him", do this and this. And this is the best you can do.

Mr. Beevers apparently was so upset at this rejection that he chose to ask to have the Court allow him to withdraw from the case. I am sure that Mr. Weidner, had he been apprised of this, knowing of this, still having put his hands to the plow, kept along the furrow. He plowed as straight as he could.

[190] I think the question is did he turn his back and say "See you later." He hung with it to the end. Was he successful, no. Was he correct, who knows. Everybody has a different style, in my opinion. But these are my rambling reasons.

The man did not only the best he could, but on reflections he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the

legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say "You have to have been in business at least five years."

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality.

It's my opinion, as I say, enough was here shown to say there was effective counsel. There was - all the other things that were to be [191] addressed have been addressed. And those are my reasons for denying the petition.

Ms. COLE:

Your Honor, we will notify the Court of our official intent to apply to the Supreme Court.

THE COURT:

Thank you all.

(Discussion off the record.)

THE COURT:

As the Court appreciates it, there's been an oral motion, rather an oral notice of appeal. The Court would like that to be filed by written notice, or motion, if you will, which, of course, is granted.

The Court feels that sixty days should be sufficient time. If it's not, certainly an extension would be entertained. And if that is the case, give sixty days for perfecting the appeal.

Ms. COLE:

Sixty days from the physical filing of the notice, or sixty days from today?

THE COURT:

Let's give –

MR. CREDO:

The court reporter has sixty days from today to file the transcript.

(End of proceedings.)

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE EX REL ROBERT SAWYER

VS. NO. 85-KP- 2056

ROSS MAGGIO, JR.
WARDEN LOUISIANA
STATE PENITENTIARY

IN RE: Sawyer, Robert; Applying for Supervisory Writs and Writ of Habeas Corpus; Parish of Jefferson 24th Judicial District Court Div. "G" Number 79-2841

December 13, 1985

Denied.

WFM

FAB

JCW

HTL

DIXON, C.J., CALOGERO & DENNIS, J.J., would grant the writ.

Supreme Court of Louisiana
December 13, 1985

/s/ Illegible
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA
A TRUE COPY

/s/ John Tarlton Olivier
John Tarlton Olivier
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER	CIVIL ACTION
versus	NUMBER 86-223
FRANK BLACKBURN, WARDEN	SECTION "I" (4)

FINDING AND RECOMMENDATION

On January 21, 1986, this matter was referred to the United States Magistrate for the purpose of conducting a hearing, including an evidentiary hearing, if necessary and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. §636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.

Robert Sawyer is a state prisoner incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. He was convicted on September 19, 1980 of First Degree Murder after trial by jury in the Twenty-Fourth Judicial District court for the Parish of Jefferson, State of Louisiana. The jury recommended that petitioner be sentenced to death.

Petitioner's conviction and sentence was affirmed on appeal. State v. Sawyer, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 335 (1983); See Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Court again affirmed the death sentence. Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983). The United States Supreme Court denied a subsequent

application for certiorari. 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984).

Petitioner was represented at the trial court level by James S. Weidner, Jr., Esquire, and by Samuel Stephens, Esquire. He was represented on his direct appeal by David Katner, Esquire, and by George Escher, Esquire.

In his application for habeas corpus relief under 28 U.S.C. §2254, petitioner alleges a violation of the Constitution and laws of the United States as follows:

1. "The death-qualification of petitioner's guilt-phase jury was illegal and unconstitutional."

2. "Petitioner was denied the right of effective assistance of counsel in violation of his rights of equal protection and due process under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."

3. "Petitioner received ineffective assistance of counsel from his court appointed attorney in violation of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."

4. "Prosecutorial misconduct during closing argument in the penalty phase of the trial rendered petitioner's trial fundamentally unfair in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution and Article 1, Section 2, 3 and 13 of the Louisiana Constitution of 1974."

5. "Petitioner was denied his right to a fair sentencing under the Eighth and Fourteenth Amendments of the United States Constitution and under the Louisiana Constitution, because the prosecutor injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence."

6. "Petitioner was denied his Fifth and Fourteenth Amendment rights guaranteed by the United States Constitution and his right under Art. 1, Section 16 of the Louisiana Constitution of 1974 to decide for himself whether or not he would testify at trial."

7. "The trial court did not instruct the jury during the guilt/innocence phase of petitioner's trial that the defendant is not required to testify and that no presumption of guilt may be raised, thereby violating petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the laws and Constitution of the State of Louisiana."

8. "The trial court's instruction to the jury at the guilt/innocence phase of his trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth

Amendments of the United States Constitution."

9. "The trial court's instructions to the jury at the guilt/innocence phase of petitioner's trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."

10. "The trial court excused jurors, who expressed only general opposition to the death penalty, depriving petitioner of the right of a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the laws and Constitution of the State of Louisiana and the standards set in Witherspoon v. Illinois, 391 U.S. 510 (1968)."

11. "The imposition of a death sentence where one of the aggravating circumstances is not supported by the evidence violates the Eighth and Fourteenth Amendments."

12. "Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the introduction of inadmissible evidence that defense counsel had no effective opportunity to rebut during the capital sentencing hearing said evidence injected on arbitrary factor into the sentencing hearing.

13. "Petitioner's sentence is excessive and disproportionate."

14. "Petitioner's sentence is arbitrary and capricious."

15. "Electrocution is a cruel and unusual means of punishment."

16. "Petitioner's sentence is invidiously discriminatory."

17. "Capital punishment is an excessive penalty."

18. "The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights."

These grounds[1] were presented in an application for post-conviction relief to the state trial court. An evidentiary hearing was conducted by the trial court before denying petitioner's application.

Petitioner applied for writs of certiorari and review with the Louisiana Supreme Court of the trial court's denial of his application. The Louisiana Supreme Court denied petitioner's application without comment. Sawyer v. Maggio, 479 So.2d 360 (La. 1985). Application for reconsideration was denied. 480 So.2d 313 (La. 1985).

The duplicate record of the Louisiana Supreme Court is before this Court. This record is sufficient for the purpose of adjudication of petitioner's claim and a federal evidentiary hearing is not necessary. 28 U.S.C.

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[1] Grounds 4, 11 and 12 additionally were presented to the Louisiana Supreme Court in petitioner's appeal of his conviction.

§254(b); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

We adopt the following statement of facts which are set forth in the opinion of the Supreme Court of Louisiana, recounting the events which led to petitioner being charged with murder.

> "A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.
>
> On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.
>
> Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However. defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absense [sic], defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then

beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me' were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she

subsequently died." [Footnotes omitted]. State v. Sawyer, 422 So.2d 95, 97-98 (La. 1982).

1. The Death Qualification of Petitioner's Guilt-Phase Jury Was Illegal and Unconstitutional

Petitioner claims that he was denied his right to a fair trial under the Sixth, Eighth and Fourteenth Amendments because a qualified group of venire persons were excluded from both the penalty phase and the guilt phase of his trial on the grounds that they were opposed to the death penalty.

This issue is without merit, having been foreclosed by the Supreme Court's recent decision in Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); See Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir. 1986).

2. Ineffective Assistance of Counsel

Petitioner raises claims of ineffective assistance of counsel in grounds two and three of his application. Since the claims in both grounds are related, we will treat both claims together.

Petitioner first contends that he was denied the effective assistance of counsel by the failure of the state trial court to appoint an attorney with at least five years of experience to represent him.

Petitioner, an indigent, was entitled to court-appointed counsel. He was originally represented by Wiley Beevers who had been admitted to practice in Louisiana for over five years. Mr. Beevers, after reaching irreconcilable

differences,[2] with petitioner was allowed to withdraw as counsel. The state trial court appointed James Weidner, Jr. to represent petitioner. Mr. Weidner advised the court that he had not been admitted to practice for five years but was told to associate counsel with the required number of years of experience.

Mr. Weidner, at the time of petitioner's trial, had been admitted to the practice of law approximately four years. Mr. Weidner attempted, but was unsuccessful in securing an attorney to assist him at trial. (R., Tr., Evidentiary Hearing, July 12, 1985, p. 120). He was successful, however, in engaging Samuel B. Stephens to assist him with petitioner's case.[3] At the time of trial, Mr. Stephens was just a few weeks shy of having been admitted to practice five years. (R., Petitioner's State Exhibit Z).

Louisiana law provides:

> "When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of

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[2] Mr. Beevers testified during the state's evidentiary hearing that the irreconcilable differences consisted of petitioner refusing to follow his advice to enter a plea of guilty to second degree murder or first degree murder without capital punishment. (R., Evidentiary Hearing, July 12, 1985, p. 16). Had petitioner accepted the offer of a plea agreement, he could only have received a sentence of life imprisonment. LSA R.S. 14:30.1.

[3] Mr. Weidner also secured the services of John Tooley, an attorney with over twenty-eight years experience, to assist him in pre-trial hearings.

> R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel." Louisiana Code of Criminal Procedure (La. C.Cr.P. Art. 512).

Although it may be necessary to consider the performance by Messrs. Weidner and Stephens in connection with the above claim, the issue raised by petitioner is not an ineffective assistance of counsel claim, but essentially a denial of equal protection.

The state trial judge, after an evidentiary hearing, concluded that noncompliance with the directive of Article 512 is not fatal to a capital conviction when a defendant actually receives effective assistance of counsel.

The trial judge for reasons orally assigned held:

> "The man [Weidner] did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say 'You have to have been in business at least five years.'

> When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality." (R., Tr., Evidentiary Hearing, July 12, 1985, p. 190).

Prior to the Louisiana Supreme Court's remand with directions to conduct an evidentiary hearing, the state trial court issued written reasons substantially identical to those above in its inital [sic] denial of petitioner's application. (R., Reasons for Judgment, February 8, 1985, pp. 2-3).

At the conclusion of the evidentiary hearing conducted on July 12, 1985, the state trial judge denied petitioner's application for post-conviction relief on the above, as well as other grounds raised.

The Louisiana Supreme Court denied, without comment, petitioner's application for certiorari and review of the trial court's ruling.

The requirement that an attorney possess a minimum of five years experience before he can be appointed to represent a defendant charged with a capital crime is a requirement of state law.

While we are bound by determinations of state law by courts of that state, Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); Willeford v. Estelle, 538 F.2d 1194 (5th Cir. 1976); Hall v. Wainwright, 493 F.2d 37 (5th Cir. 1974), we are unable to locate any other case in which the highest court of Louisiana has

given the same interpretation to Article 512 as did the state trial court herein.[4]

The state trial court in its written reasons of February 8, 1985 concluded that petitioner's due process and equal protection rights were not violated by the failure of the court to appoint him an attorney with five or more years experience. (R., Reasons for Judgment, supra, p. 5). We do not have to reach the issue of whether petitioner's due process or equal protection rights were violated since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state trial court concluded in its assigned oral reasons that petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner] . . . we had a mature and reasoned and in some ways seasoned certainly beyond his physical, years, for the defense of

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[4] The refusal of the Louisiana Supreme Court to grant writs in the case *sub judice* does not constitute a ruling on the merits. See State v. Guillot, 353 So.2d 1005, 1007 n.1 (La. 1977); Coco v. Winston Industries, Inc., 341 So.2d 332, 335 n.1 (La. 1977). The Louisiana Supreme Court appeared to take the same approach taken by the state trial court herein in determining whether the dictates of Article 512 were violated in State v. Motton, 395 So.2d 1337, 1342 (La. 1981). cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981), when it held, on a record silent as to the length of time of practice of an appointed attorney, that the defendant failed to establish prejudice.

this gentleman."[5] (R., Evidentiary Hearing, July 12, 1985, p. 187).

A review of the state record convinces us that petitioner received the effective assistance of counsel in Mr. Weidner's representation.

The only prejudice that petitioner seeks to establish in not having been represented by counsel with at least five years experience is the alleged deficient conduct set forth in his claim of ineffective assistance of counsel. We find that claim to be meritless for reasons assigned below.

The state court record and the trial transcript reveal that the evidence of petitioner's guilt was ample. Petitioner's exculpatory statement introduced into evidence at trial by the state alleged that Lane was responsible for the acts causing the victim's death. However, defendant did not seriously contest at trial his involvement in the beating and burning of the victim. The theory of his defense was that he lacked the specific intent to commit

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[5] In the earlier stages of the criminal proceeding, petitioner was represented by Mr. Beevers, who met the time qualifications of Article 512. After Mr. Beevers withdrew as petitioner's attorney, Mr. Weidner along with Mr. John Tooley represented petitioner at hearings on pre-trial motions. At trial, Mr. Weidner had the assistance of Sam Stephens. Mr. Tooley had been a member of the bar for over twenty years. Mr. Stephens had been a member for four years, eleven months and a few weeks. Although Messrs. Tooley and Stephens were not appointed by the court to represent petitioner, a distinction perhaps with little difference, it would appear that petitioner was at all times represented by counsel within the spirit, if not the letter of Article 512.

first degree murder due to intoxication. Ms. Shano testified that she saw petitioner kick Ms. Arwood into the bathtub rendering her unconscious. (R., Tr., pp. 1146-49). She also saw petitioner pour hot water on Ms. Arwood, walk all over her back as she was lying on the floor and beat her with a belt. (R., Tr., pp. 1149-50). Ms. Shano also testified that she overheard petitioner say, "[I] can show you how cruel I can be . . . " just before she smelled something burning. (R., Tr., p. 1151). Ms. Shano also overheard conversations between Lane and petitioner which indicated petitioner set fire to Ms. Arwood. (R., Tr., p. 1152).

The fingerprints found on the can of lighter fluid used to set Ms. Arwood on fire belonged to petitioner. The Louisiana Supreme Court found the evidence "ample" from which a rational juror could have found that the defendant was engaged in the perpetration of aggravated arson and that he had acted with specific intent. State v. Sawyer, supra, 422 So.2d at 99. The court's determination is entitled to great weight. Wingo v. Blackburn, 786 F.2d 654 (5th Cir. 1986). Webster's New Collegiate Dictionary defines ample as "generous or more than adequate in size, scope, or capacity . . . generously sufficient to satisfy a requirement or need".

Petitioner does not address the deficiency of appellate counsel, both of whom he claims had not been admitted to practice for more than five years at the time of their representation of him.

The record reflects that these attorneys presented both meaningful and serious issues to the Louisiana Supreme Court in petitioner's appeal.

Petitioner does not suggest other issues appellate counsel might have urged on appeal. Petitioner must establish " . . . [t]hat counsel's errors were so serious that counsel was not functioning as the counsel guaranteed to the defendant by the sixth amendment." McCrae v. Blackburn, 793 F.2d 684 (5th Cir. 1986). Any error in the appointment of appellate counsel with more than five years experience to represent petitioner is likewise harmless beyond a reasonable doubt.

Petitioner's claim that he was denied equal protection of the law in the appointment of counsel with less than five years experience is without merit.

Petitioner raises several instances of alleged deficient conduct on the part of his counsel in his claim that he did not receive the effective assistance of counsel.

He claims that counsel:

a) was admitted to practice for less than five years;

b) objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;

c) failed to object during voir dire to the prosecutor's reference to evidentiary facts that were not later established at trial;

d) failed to conduct a meaningful voir dire; e) failed to discuss with petitioner the nature of the defense;

f) failed to allow petitioner to testify during the guilt phase of the trial;

g) failed to adequately prepare defense witnesses for trial;

h) failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;

i) failed to present a closing argument during the guilt phase of the trial;

j) presented an unprepared defense during the penalty phase of trial;

k) failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;

l) failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and

m) failed to make effective closing argument during penalty phase of trial.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show: 1) that his counsel's performance was deficient; and, 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984).

Under the Supreme Court's formulation of the required showing of prejudice,

> "[T]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, 104 S.Ct. at 2068.

If the Court finds that petitioner has made an insufficient showing as to either one of the two stages of

inquiry, i.e. deficient performance or actual prejudice, the Court may dispose of the claim without addressing the other stage. Strickland v. Washington. supra, 104 S.Ct. at 2069-70.

In determining whether counsel's performance falls below the objective standard of reasonableness, our scrutiny should be "highly deferential", recognizing " . . . strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". Strickland v. Washington, supra, 104 S.Ct. at 2066; Marler v. Blackburn, 777 F.2d 1007 (5th Cir. 1985).

Petitioner may not simply allege prejudice, he must affirmatively prove it. Strickland v. Washington, supra, 104 S.Ct. at 2067; Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984), cert denied, ___ U.S. ___, 105 S.Ct. 3490, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983).

We now treat petitioner's individual claims of ineffective assistance of counsel.

a) Counsel's Admission To Practice For Less Than Five Years

Mere inexperience alone will not determine whether a defendant received effective assistance of counsel. The test rather is counsel's performance in representing the defendant. United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109; United States v. Badolato, 701 F.2d 915 (11th Cir. 1983).

Petitioner has not established that trial and appellate counsel's failure to meet the five year admission to practice minimum resulted in any prejudice to him. Counsel were effective. Petitioner does not show that the results of the trial or appeal would have been any different had counsel with more experience been appointed.

b) Counsel Objected To The Prosecutor Advising The Jury Panel During Voir Dire Of The Penalties For A Lesser Included Offense

Petitioner suggests that the jury should have been made aware that he could have been sentenced: 1) to life imprisonment, without benefit of parole, probation or suspension of sentence if it returned a guilty verdict of second degree murder; or, 2) twenty years imprisonment on a verdict of manslaughter. Petitioner does not explain, however, how this prejudiced him since it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder. Petitioner's contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence.

We are convinced, in view of the evidence, that the verdict would not have been different had the jury been made aware of the alternate penalties.

c) Counsel Failed To Object During Voir Dire To The Prosecutor's Reference To Facts Not Later Established At Trial

Petitioner singles out two references made by the prosecutor during voir dire examination to support his

claim. The references are to claims by the prosecutor that " . . . "[S]he [the victim] had a hammer shoved up her vaginal area as well as other incidents"; and "she was halfway drowned in the bathtub and set on fire after she was raped". (R., Petition, pp. 12-13).

The second referenced statement above was not a mischaracterization of the evidence ultimately produced during the trial. There is support in the evidence offered at trial that the victim was "halfway" drowned in the bathtub and set on fire after she was raped.

There was no evidence introduced during trial, however, which would support the first referenced statement that a hammer was used in the attack upon the victim.

Had counsel objected to the remark during voir dire, the jury's verdict would not have been different. The reference by the prosecutor to the use of the hammer, viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict.

Defense counsel did request a mistrial during the testimony of a state witness who alluded to the possible use of a hammer during the attack on the victim. The court denied the motion and instructed the jury that up to that point in the trial, there had been no testimony about a hammer and to disregard the witness's comment. (R., Tr., pp. 1282-1285).

Petitioner suffered no prejudice by the prosecutor's earlier remark.

d) Counsel Failed To Conduct A Meaningful Voir Dire

Petitioner complains that counsel failed to inquire during voir dire examination of the prospective jurors' prior jury service and their attitude regarding the failure of a defendant to testify in his own behalf.

Petitioner does not articulate how he was prejudiced by counsel's failure to find out if a juror had prior jury service. It would be pure speculation to consider that one or more of the selected jurors would have been excused if it was known that he or she had served on a prior jury.

Additionally, petitioner has not established if there were in fact any jurors who had prior jury service.

Likewise, counsel's failure to inquire of the jurors' attitude regarding a defendant's failure to take the stand does not entitle petitioner to relief herein.

Counsel did not plan to call petitioner to the stand during the guilt phase of the trial. He testified during the state evidentiary hearing that he did not ask the prospective jurors about their attitude toward a defendant not taking the stand on his behalf, to avoid emphasizing the fact that petitioner would not in fact testify. It was a tactical decision. (R., Evidentiary Hearing, July 12, 1985, pp. 146-47).

e) Counsel Failed To Discuss The Nature Of His Defense With Petitioner

Petitioner claims that counsel did not consult with him about his defense and refers to an affidavit filed in the state record as Exhibit "AA" in support of this claim.

The allegations in petitioner's affidavit belie any contention that he was not apprised of the defense that was going to be presented on his behalf. He admitted discussing the case with counsel on several occasions, and on one occasion was told that "alcohol psychosis" would be advanced as a defense to the crime.

Petitioner's claim that he was not advised of his defense before trial is contradicted by his own affidavit, as well as Mr. Weidner's testimony during the state evidentiary hearing.

f) Counsel Failed To Advise Petitioner Of His Right To Testify On His Own Behalf

Petitioner, in connection with this claim, complains that he was not given the opportunity by his attorney to make his own decision as to whether he would testify on his own behalf. Petitioner claims that he would have testified given the choice.

Petitioner, however, does not indicate what his testimony would have consisted of, had he been allowed to testify. He testified during the penalty phase of the trial that he remembered little about the events of the night. (R., Tr., p. 1508).

The fact of petitioner's prior conviction for involuntary manslaughter could have been revealed during the guilt phase of the trial had petitioner taken the stand, a factor that could not but further damage any defense petitioner presented. In fact, petitioner's prior conviction, and its possible revelation during the guilt phase of the trial was a major reason his counsel decided not to put

him on the witness stand. (R., Evidentiary Hearing, July 12, 1985, p. 126).

Petitioner's exculpatory statement, given the police shortly after his arrest, in which he put the blame for the victim's injuries on his co-defendant was read to the jury during the state's case in chief.

Had petitioner testified at trial, he may have had difficulty in reconciling for the jury his defense of lack of intent to commit the crime due to intoxication, and his prior statement that someone else committed the crime.

We cannot second-guess counsel's strategy in not calling petitioner to the stand. The decision not to do so was not outside the realm of effective representation.

Mr. Weidner testified during the state evidentiary hearing that he consulted with petitioner on several occasions concerning not calling him as a witness. (R., Evidentiary Hearing, July 12, 1985, p. 124-25). It was not brought out, however, if counsel, as claimed by petitioner, gave him an opportunity to make the decision himself as to whether he wanted to testify. Petitioner does not claim he made a request of his counsel to testify, he merely asserts he was not given an opportunity to make that choice.

Even assuming that petitioner in fact was not given the opportunity by counsel to make that decision, he has failed to establish that he was prejudiced by the alleged error. Petitioner does not indicate what his testimony would have been had he testified during trial.

g) Counsel Failed To Adequately Prepare Defense Witnesses For Trial

Petitioner complains that his attorney called only five witnesses in his defense and spent only one-half hour with two of those witnesses, his sister and brother-in-law, in preparing their testimony for trial.

Brevity of time spent by counsel in preparing a case is not of itself sufficient to provide relief to a habeas applicant. Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985).

Petitioner does not indicate what additional facts would have been established at trial had counsel spent more time with the two witnesses mentioned above. It is unclear by petitioner's statement that "a total of only five defense witnesses were called to testify," whether he is complaining that other witnesses should have been called. One of petitioner's present counsel filed an affidavit in the state court proceedings that petitioner's sister gave her the names of several witnesses who would have been available to testify at petitioner's trial. (R., Application for Writs to Louisiana Supreme Court, No. 84 KP 0919, Exhibit S). This list of potential witnesses all appear to be relatives of petitioner. There are no allegations, however, as to what their expected testimony would be.

Without specific allegations of the expected testimony of other witnesses and some indication that they would have been available to testify at trial, petitioner has failed to establish prejudice.

h) Counsel Failed to Call An Expert To Give An Opinion As To The Effect Of Alcohol On Petitioner

Petitioner, while acknowledging that his attorney obtained the testimony of two physicians in aid of his defense of toxic psychosis, complains that his attorney should have procured other experts who, presumably after examining petitioner, would be able to testify as to the effect alcohol has on petitioner.

The two experts who testified on petitioner's behalf were Doctors Albert DeVilliere and Genevieve Arneson, psychiatrists, who had been appointed to a pre-trial lunacy commission to examine petitioner. Each examined petitioner approximately for one-half hour in connection with that earlier proceeding and concluded that petitioner understood the nature of the charges filed against him and was able to assist his attorney in his defense.

Counsel for petitioner was successful at trial in eliciting opinions from these two experts which supported the defense of toxic psychosis. (R., Tr., pp. 1337, 1338, 1409).

Petitioner complains, however, that these opinions were based upon a set of hypothetical facts only, and that counsel should have procured an expert who could have testified as to the actual effect of alcohol on him.

Petitioner does not suggest what type of examination would produce the type of results he seeks or that those results would even be obtainable.

Dr. DeVilliere testified both at trial and during the sanity commission proceeding that there are no tests to determine a man's intent or the effect of toxic psychosis

on that intent at the time of the crime. He claimed that a physician would have to be at the scene of the crime during its commission to be in a position to render such an opinion. (R., Tr., pp. 436, 1314).

Petitioner offers no evidence that establishes he actually suffered from toxic psychosis to justify our considering his claim.

i) Counsel Failed to Present A Closing Argument During The Guilt Phase of Trial

Petitioner complains that his attorney was deficient in not presenting a closing argument during the guilt phase of trial.

Mr. Weidner testified during the state evidentiary hearing that he made a deliberate decision not to give a closing argument based upon two separate considerations. First of all, he was knowledgeable of the prosecutor's reputation for presenting strong and damaging rebuttal arguments. Since the prosecutor had given what Weidner considered to be a "mild" closing argument, he hoped to prevent, by not giving a closing argument, the prosecutor presenting a stronger rebuttal. (R., Evidentiary Hearing, July 15, 1985, p. 128).

Secondly, Weidner realized the strong case the state had against his client as to his guilt and felt the chance of salvaging anything for his client was in the penalty phase where he hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk what credibility he may have had with the jury by advancing arguments as

to petitioner's innocence that the jury might perceive to have been totally unsupportable.

While an attorney's decision to waive closing argument might ordinarily deprive a defe ant of the effective assistance of counsel, we do find that to be the result in the case before us.

Mr. Weidner believed the case against his client on the guilt phase to be very strong. Prior counsel, Beevers, had withdrawn from the case after he and Sam Dalton, a Jefferson attorney experienced in the defense of capital cases, failed to convince petitioner to accept a plea bargaining agreement to plead to the lesser charge of second degree murder. They likewise had believed the case against petitioner to be very strong. (R., Evidentiary Hearing, July 15, 1985, p. 14-15.).

Under the circumstances, the jury could not help but to have understood the nature of petitioner's defense. They were apprised of it during voir dire and counsel's opening statement. The testimony of defense witnesses as to aspects of the theory of defense was simple and direct. Counsel's participation in the entire trial was quite active. See Martin v. McCotter, No. 85-1311, slip. op. 8385-86 (5th Cir. August 13, 1986).

We are convinced that had counsel presented a closing argument, the jury's verdict would not have been different.

j) Counsel Presented An Unprepared Defense During The Penalty Phase Of The Trial

Petitioner complains that counsel did not conduct a proper investigation in connection with the penalty phase of his trial which resulted in the failure to call other witnesses or present mitigating evidence.

With the possible exception of the names of relatives contained in his attorney's affidavit mentioned above, petitioner does not identify these additional witnesses or the substance of their testimony. He does not indicate what additional evidence his sister would have offered.

Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization.

The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses in the penalty phase of the trial.

Petitioner has not established prejudice in connection with the above issue.

k) Counsel Failed To Object Or Move For A Mistrial During Improper Argument By The Prosecutor During The Penalty Phase Of Trial

Petitioner, in support of the above claim, refers to statements made by the prosecutor which are set out in claims of alleged error in his application for relief, i.e., claims 4 and 5 below.

We find no prejudice to petitioner based upon the above alleged error for reasons that will be obvious when we treat this issue more fully in connection with petitioner's claims 4 and 5 below.

l) Counsel Failed To Object To Erroneous Instructions Given Jury By Court During Guilt And Penalty Phase Of Trial

Petitioner claims that counsel should have objected to the trial court's a) failure to instruct the jury as to how they should treat a defendant's failure to testify; b) instruction on intent; and, c) instruction defining principals.

We will treat below petitioner's complaints as to b and c above, in connection with related issues raised in claims 8 and 9.

As to counsel's failure to object to the court's charge to the jury in that it did not include a charge as to how the jury should treat a defendant's failure to testify on his behalf, Mr. Weidner testified during the state hearing that he purposely requested the court to omit that charge to avoid calling undue attention to the fact that petitioner did not take the stand. (R., Evidentiary Hearing, July 12, 1985, pp. 150-51). Mr. Weidner's decision falls within the definition of trial strategy.

If the particular charge had been included in the court's instructions, the result of the trial would not have been different.

m) Counsel Failed To Make An Effective Closing Argument During The Penalty Phase Of The Trial

Counsel's argument during the penalty phase of the trial is contained in approximately one typewritten page of the trial transcript.

Petitioner complains that the argument was cursory, perfunctory and unpersuasive. We conclude that it was unpersuasive because it was unsuccessful, but lack of success of itself would not result in a conclusion that counsel was ineffective.

The remarks of counsel were of a cursory and perfunctory nature, but petitioner has not established that the jury's recommendation would have been different had counsel dealt longer on mitigating factors favoring him. There was little available by way of mitigation in petitioner's favor.

4. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner complains that the prosecutor was guilty of misconduct when he made references to the possibility of a pardon for petitioner if the jury recommended life imprisonment. Additionally, he claims that the assistant district attorney's appeal to a "war on crime", or "community expectation" argument to the jury prejudiced him. The portions of the rebuttal argument to which petitioner objects follows:[6]

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[6] Petitioner also refers us in his petition to the prosecutor's entire closing argument and rebuttal, both in the guilt and

(Continued on following page)

"At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statue (sic) does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. Tr.Tr. 986:14-29.

. . . if the law which we have in this state is to have any piece [sic], if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their own homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the lines because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior conviction for killing a four year old child, then

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penalty phase of the trial in support of his claim of prosecutorial misconduct without pointing out specific portions of the argument as constituting error. Mere conclusory allegations of error are insufficient to support a claim for relief. See Ross v. Estelle, 694 F.2d 1008 (5th Cir. 1983).

what are the people of this Parish to believe. They are going to believe what a lot of people believe. there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect. . . . Tr.Tr. 987-17-29; 988:1-6." (R., Petition, p. 17).

The Louisiana Supreme Court discussed in its opinion affirming petitioner's conviction, the prosecutor's reference to the possibility of a pardon, and found petitioner's claim to be without merit.

That Court held:

" . . . There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. State v. Willie, 410 So.2d 1019 (La. 1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See State v. Lindsey, 404 So.2d 466 (La. 1981), and State v. Willie, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence

him to the 'living death of life imprisonment', which implied that defendant could never be released. Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations." [Footnotes ommitted]. State v. Sawyer, supra, 422 So.2d at 104.

We do not disagree with the Supreme Court's conclusion on this issue. Nor do we find merit to petitioner's claim that the prosecutor's use of a "war on crime" argument or his appeal to the jury that the community might not understand a verdict which did not impose the death penalty prejudiced him. See Whittington v. Estelle, 704 F.2d 1418 (5th Cir. 1983), cert. denied, 464 U.S. 983, 104 S.Ct. 428, ___ L.Ed.2d ___ (1983).

A prosecutor is permitted in closing argument to state to the jury what he believes to have been established and to comment fairly on it. Whittington v. Estelle, supra.

Prejudicial comments by a prosecutor in closing argument will justify federal habeas relief only if the error was material in the sense of a crucial, critical and highly significant factor. Washington v. Estelle, 648 F.2d

276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983).

A prosecutor's improper argument to the jury

> " . . . [d]oes not present a claim of constitutional magnitude which is cognizable in a proceeding under 28 U.S.C. 2254 unless such argument is so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." Whittington v. Estelle, supra, at 1421.

In viewing the remarks of the prosecutor in the context of the entire trial, which we must, we conclude that the remarks were not so prejudicial as to render the trial fundamentally unfair.

Since petitioner was not prejudiced by the remarks, petitioner is not entitled to relief on his claim of ineffective assistance of counsel presented in claim 3, k above.

5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner additionally complains of the following closing remarks by the prosecution as being prejudicial:

> " . . . you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard

in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. Tr.Tr. 982:6-21.

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. Tr.Tr. 984:10-21." (R., Petition, p. 18).

The issue raised by the above quoted argument of the prosecutor is a vague reference to the possible review of the jury's verdict by a higher court.

An argument by a prosecutor, in the penalty phase of a capital case, which suggests to the jury that its responsibility is lessened by appellate review has been condemned in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

The state prosecutor in the case *sub judice* made another reference to possible review of the jury's verdict by a higher court of which petitioner does not complain.

"It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have cross examined him and gone more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal after Mr. Weidner argues. Thank you." (R., Tr., p. 1519).

Because petitioner did not complain of the comments immediately above, either in his habeas application filed herein or his state habeas proceedings, we cannot consider whether those comments present any grounds for relief.

Although petitioner has not urged error in the prosecutor's comments quoted immediately above, we

should, however, consider the possible effect of those comments on the outcome of the proceedings since we are required to view the comments of which petitioner complains in light of the entire record.

Petitioner's counsel did not object to the prosecutor's comments at the time they were made. The contemporaneous objection rule would not prevent our consideration of the claimed error, as the Louisiana courts themselves in a death case would not be constrained from considering the merits of the issue. State v. Willie, supra.[7]

While the prosecutor's comments in the instant case dangerously approach reversible error, we do not believe it actually reaches that mark.

The remarks herein are distinguishable from the prosecutor's remarks condemned in *Caldwell*. In *Caldwell*, the assistant district attorney made the following argument in response to the defendant advising the jury of their awesome responsibility in imposing the death penalty:

'ASSISTANT DISTRICT ATTORNEY:

Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the

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[7] In fact, in the case *sub judice*, the Louisiana Supreme Court sua sponte noticed a potential problem with the prosecutor's reference to a possible pardon despite the absence of a contemporaneous objection. Sawyer, supra, 422 So.2d at 104. It is perhaps significant that the Louisiana Supreme Court, in fulfilling their duty in death cases to view the record for any apparent error in the record, did not consider apparently that the remarks petitioner complains of above were significantly prejudicial.

defense has taken. I don't think its (sic) fair. I think its (sic) unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

'COUNSEL FOR DEFENDANT:

Your Honor, I'm going to object to this statement. It's out of order.

'ASSISTANT DISTRICT ATTORNEY:

Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

'THE COURT:

Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

'ASSISTANT DISTRICT ATTORNEY:

Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shall not kill." If that applies to him it applies to you, insinuating that decision is the final decision and that they're gonna to take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I

> think its (sic) unfair and I don't mind telling them so.' Caldwell v. Mississippi, supra, at 2637-38.

A consideration by the *Caldwell* court was that the prosecutor's remarks in that case were "focused, unambiguous and strong" and because the trial judge, not only failed to give a curative instruction, but openly approved the prosecutor's remarks. Caldwell v. Mississippi, supra, at 2645.

The comments complained of herein were ambiguous and not merely as strong as the comments in *Caldwell*. The court's instructions to the jury in the case herein did not lend support to the prosecutor's statements concerning appellate review. To the contrary, the trial court, after meticulously instructing the jurors on the factors they were to consider in their deliberations, concluded with the injunction, that *"[I]t is your responsibility* in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or to life imprisonment." [Emphasis added]. (R., Tr., p. 1527).

The prosecutor's remarks complained of herein, while suggesting possible appellate review, were not sufficient to form a conclusion that the jury's responsibility was lessened by appellate review. The prosecutor told the jury in effect that you [the jury] by recommending the death penalty will be telling any court that reviews this case that " . . . [t]his man from his actions could be prosecuted to the fullest extent of the law". (R., Tr., p. 1518).

Reference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty.

As observed in State v. Mattheson, 407 So.2d 1150, 1165 (La. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); quoting State v. Berry, 391 So.2d 406 (La. 1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981) " . . . virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and the court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility". See also Moore v. Maggio, 740 F.2d 308, 320 (5th Cir. 1984); on subsequent application for habeas relief, 774 F.2d 97, 98 (5th Cir. 1985).

Although *Mattheson* was decided prior to *Caldwell*, its rationale appears to comport with the holding in *Caldwell*.

Even considering the prosecutor's remarks in connection with the comments appearing on page 1519 of the trial transcript, petitioner was not prejudiced. Those later comments, although "hinting" that an appellate court might have the final decision on the imposition of the death penalty, the comments are ambigious at best.

The prosecutor told the jury:

> " . . . [a]nd if you are wrong in your decision, believe me, believe me there will be others who will be behind you *to either agree with you or to say you are wrong so I ask that you do have the*

courage of your convictions." (R., Tr., p. 1519). [Emphasis added].

The above quote, when viewed as a whole, would not necessarily suggest to the jury that its responsibility is lessened, considering the prosecutor's statement to the jury to " . . . have the courage of your convictions".

The standard to be employed in determining whether prejudice resulted from alleged improper remarks by the prosecutor, condemned in *Caldwell*, is the "reasonable probability" test for determining prejudice established by Strickland v. Washington, supra. See Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) en banc; Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985), rehearing denied, 776 F.2d 1486 (commenting that there is no incompatibility between the standard enunciated in *Caldwell* and that established in *Strickland*), rehearing en banc denied, 778 F.2d 623 (11th Cir. 1985).

The defendant must show under the appropriate standard, " . . . that there is a reasonable probability that, but for counsel's [prosecutor's] unprofessional errors, the result of the proceeding would have been different: a reasonable probability is a probability sufficient to undermine confidence in the outcome". Strickland v. Washington, supra, 104 S.Ct. at 2068.

In the instant case, the jury found two aggravating circumstances to support its recommendation of the imposition of the death penalty, when only a finding of one would have been sufficient. The evidence of defendant's guilt was ample. There was little in the way of mitigating evidence. The court's instructions properly

directed the jury's attention to those factors it was to consider in arriving at a recommendation.

The Louisiana Supreme Court, upon review of the record on appeal, determined:

> "We are convinced . . . that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning the recommendation on appeal." State v. Sawyer, supra, 422 So.2d at 106.

The court's finding is entitled to great weight. Wingo v. Blackburn, supra.

We conclude, based on the above considerations, that there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different.

For these same reasons, we conclude that petitioner has failed to establish prejudice on the claim of ineffective assistance of counsel raised in ground 3, k above.

6. FAILURE TO ALLOW PETITIONER THE RIGHT TO MAKE DECISION AS TO WHETHER HE WOULD TESTIFY ON HIS OWN BEHALF

Petitioner complains that his attorney made the decision on his own as to whether or not petitioner would testify during the guilt phase of the trial without advising him that he had a right to make that decision himself.

A related issue involving a claim of ineffective assistance of counsel has been disposed of above.

Petitioner does not claim that he ever made a request of his counsel to be allowed to testify. Petitioner does not indicate what his testimony would have been had he made the decision to testify. Petitioner has not established that he was prejudiced by the alleged error.

7. TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO HOW THEY SHOULD TREAT A DEFENDANT'S FAILURE TO TESTIFY

Petitioner claims that he was prejudiced by the trial court's failure to include an instruction to the jury that a defendant is not required to testify and that no presumption of guilt may be drawn from the fact that a defendant does not testify.

The record reflects that the state judge's instructions to the jury did not contain such a charge.

Mr. Weidner testified at the evidentiary hearing that he requested the trial judge not to include the above charge in the court's instructions as a strategy move to avoid undue attention being drawn to the fact that defendant did not take the stand in his defense.

No error was committed by the court for failing to include the charge since it was purposefully omitted at the request of defense counsel.

We have already disposed of petitioner's allegations that counsel's request to the court to omit the charge constituted ineffective assistance of counsel.

8. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following instruction given the jury by the trial court had the effect of relieving the state from its burden of proving "specific intent" an element of the crime.

> "A specific intent to kill may be implied where there are no external signs of the intent beyond the mere facts of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing. Tr.T. 926:19-24." [R., Tr., p. 1481).

For a trial error to be reviewable in Louisiana, an objection must be made at the time of its occurrence. LSA Louisiana Code of Criminal Procedure Art. 841. Absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state prisoner whose claim would not be reviewable in the state court because of the default. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Petitioner does not allege cause for the failure to object to the charge. A claim that the "cause" was due to counsel's ineffectiveness is not sufficient to establish cause. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981). See Weaver v. McKaskle, 733 F.2d 1103 (5th Cir. 1984); Stokes v. Procunier, 744 F.2d 475 (5th Cir. 1984).

Even if cause existed for failure to object to the charge, petitioner would not be entitled to relief on the

above claim. The complained of charge quoted above is only a small part of the entire instruction given the jury on "specific intent". The quote is taken out of context. A review of the court's entire charge on that element of the offense reveals that the jury was instructed how they *may* treat various factual circumstances [including the one petitioner complained of] in order to determine whether a defendant had specific intent to kill someone. [Emphasis added]. The court concluded by telling the jury: "Therefore you should determine whether or not there was criminal intent by considering all of the facts and circumstances of this case". (R., Tr., p. 1482).

Because we would determine the charge complained of to have been proper, petitioner's companion claim that counsel's failure to object to the charge constituted ineffective assistance of counsel is without merit.

9. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following charge on the law of principals improperly relieved the state of its burden to prove specific intent.

> "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principals.
>
> In order words, to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it another way, that he or they aided, abetted and assisted in the perpetration of the offense.
>
> All persons knowing the unlawful intent of the person committing the crime, who were present, consenting thereto, and aiding and abetting either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals and equal offenders and subject to the same punishment. (T.T. 931:5-24)." [R., Tr., p. 1466].

No contemporaneous objection was made in connection with the above charge to the jury and there is no objection of cause for the failure to object to the charge. This claim as well as petitioner's companion claim of counsel's failure to object to the above charge is without merit.[8]

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[8] Petitioner would not succeed on the merits of this claim. Petitioner argues in his brief that the above instruction might have caused the jury to have found him guilty if they believed that he failed to prevent Lane from beating the victim. Petitioner fails to include the trial court's complete charge on principals which include an instruction that a person cannot be considered a principal under the circumstances suggested by petitioner. (R., Tr., p. 1467). Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), reh'g denied, 697 F.2d 699 (1983) cited by petitioner in support of his claim involved a conspiracy instruction and its holding is inapposit [sic] to the conclusion we reach herein. In the instruction given herein, the court charged the jury that a principal is one who " . . . [k]nowing the unlawful intent of the person committing the

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10. TRIAL COURT ERRED IN EXCUSING A JUROR WHO EXPRESSED ONLY A GENERAL OPPOSITION TO THE DEATH PENALTY

Petitioner complains that the court excused a prospective juror after she expressed only a general opposition to the imposition of the death penalty.

The juror, Gwendolyn Lee, when asked her feelings toward the death penalty, replied:

> "What are your feelings about capital punishment?
>
> A. I don't agree with it.
>
> Q. You say you don't agree with it. That is regardless of what the evidence may show, no matter how heinous of a crime, you are telling me you are morally or religiously, no matter what the evidence may show you could not even consider the imposition of the death penalty?
>
> A. No I don't think it is fair.

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crime . . . , [and] . . . consenting thereto. . . . " aids and abets in the commission of the crime. (R., Tr., p. 1466). The prosecutor referred to the law or principals in his closing argument. (R., Tr., p. 1444). However, it was in reference to petitioner being a principal in the aggravated rape of Ms. Arwood. The argument was harmless, since the jury did not find the aggravated rape to have been an aggravating circumstance after the penalty hearing. The evidence at trial established that petitioner did not participate in the crime merely as an aider and abetter. He himself beat the victim, caused her to become unconscious when he kicked her into the bathtub, poured the lighter fluid on her and lit her on fire.

> Q. You don't think it's fair. You have had this belief for quite some time?
>
> A. Yes.
>
> Q. Is this a religious belief, is the death penalty contrary to your religion?
>
> A. Yes.
>
> Q. You have strong contrary objections to it no matter what the evidence may show.
>
> A. That is right.
>
> THE COURT:
>
> Let me explain this to you, Mrs. Lee. We do have a death penalty in Louisiana. That doesn't mean it would be imposed in this case or any other case. What Mr. Weidner is asking you if the facts of this case indicate that the death penalty should be imposed, could you vote for it under those circumstances?
>
> MRS. LEE:
>
> I really don't think I could.
>
> THE COURT:
>
> You don't think you could?
>
> MRS. LEE:
>
> No." (R., Tr., pp. 811-813).

The inquiry that we must make to determine if a juror may be excluded for his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986).

This test is to be applied primarily by the trial judge and his determination that a juror should be excused because of his or her views on capital punishment is accorded a presumption of correctness under 28 U.S.C. § 2254(d). Wicker v. McCotter, supra, at 493.

There is support for the trial court's determination that Mrs. Lee's views on capital punishment might substantially impair her performance as a juror.

11. VIOLATION OF PETITIONER'S RIGHTS UNDER EIGHTH AND FOURTEENTH AMENDMENT WHEN ONE OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY EVIDENCE

The issue petitioner raises under this claim is essentially a complaint that he was prejudiced in the penalty phase of his trial by the introduction of a crime, the involuntary manslaughter of a child, which was unrelated to any aggravating circumstances upon which the jury could find in imposing the death penalty.[9]

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[9] It is unclear from the petition filed by petitioner whether he is also complaining that evidentiary support for all of the aggravating circumstances found by the jury was required. This issue, if raised, is without merit. This issue was treated fully in petitioner's direct appeal. The Louisiana Supreme Court held that an " . . . [a]dequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenses properly exposed

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Although petitioner does not articulate the constitutinal [sic] error present in this claim, it would appear that he is complaining of the same error that was raised in his direct appeal and on which the United States Supreme Court remanded to the Louisiana Supreme Court for further consideration in light of the former Court's holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983).

The court in *Zant* held *inter alia* that a death sentence based upon two or more statutory qualifying grounds, one of which was later determined to be invalid, would not automatically require reversal of the death penalty unless it was determined that the deficient ground was invalidated on the basis it involved constitutionally protected activity, or the penalty was arbitrary and capricious because the invalidated ground involved the introduction of evidence not otherwise admissible.

On remand, the Louisiana Supreme Court held that the holding in *Zant* did not preclude the affirmance of the imposition of the death penalty in petitioner's case since the evidence of the manslaughter conviction, even if erroneously admitted to support one of the aggravating circumstances, was properly admitted to shed light on petitioner's character. Sawyer v. Louisiana, 442 So.2d 1136 at 1139-40.

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to the possibility of the death sentence. See Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc)." State v. Sawyer, 422 So.2d at 101-102.

A defendant's character constitues valid considerations by the jury during the penalty phase of the trial. LSA Louisiana Code of Criminal Procedure Art. 905.2.

Petitioner's application for writ of certiorari to the United States Supreme Court from the decision of the state court after remand was denied. Sawyer v. Louisiana, ___ U.S. ___, 104 S.Ct. 1719, ___ L.Ed.2d ___ (1983).

Petitioner does not raise a constitutional question under the present claim as the evidence of manslaughter conviction was properly admissible under Louisiana law to establish petitioner's character, an important and relevant issue during the penalty phase of the trial.

12. INADMISSIBLE EVIDENCE WAS INTRODUCED DURING PENALTY PHASE OF TRIAL

Petitioner next complains about the prosecutor's reference during the penalty phase of the trial to the hearsay statements of uncalled witnesses, that the child, who was the victim of the Arkansas manslaughter conviction, was the victim of prior physical abuse at the hands of petitioner.

Petitioner refers in his petition to the following statements of the prosecutor as objectionable:

> "If I were to tell you that I have in my custody the District Attorney's file from Arkansas relating to that conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child, was an abused child, that (sic) constantly beaten by

> your brother, would you believe those six people? (See T.T. p. 961)." (R., Tr., p. 1496).
>
> "I will read to you a hospital report in reference to little Laurie. Four year old white female, Miss Laura Sawyer arrived at the emergency room on December 4, 1973 at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such. . . . " See T.T. 961-962. (R., Tr., p. 1496-97).

Petitioner goes on to complain that subsequent to the second statement quoted above, the prosecutor elicited testimony from the state's witness about information that the child was the victim of prior abuse, which information was contained in the hospital report prepared on the date the child was admitted with her fatal injury.

The prosecutor apparently used this material in an attempt to counteract the favorable testimony of petitioner's sister that he took good care of the child.

Petitioner admitted in his testimony during the penalty phase of the trial that the child did have bruises on her body the day she was brought to the hospital. He denied that the prior injuries were caused by him, but laid the blame on the child's mother.

Petitioner did not object at trial to the testimony of which he now complains herein. The contemporaneous objection rule is not an issue in considering this claim, however, since the state has not raised the rule in connection with this claim in its response to the petition. See Miller v. Estelle, 677 F.2d 1080 (5th Cir. 1982), cert. denied, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 636 (1982).

Hearsay testimony, with certain limited exceptions, is generally inadmissible. We can only conclude, without any suggestion to the contrary by the respondent, that the statements and testimony complained of herein were inadmissible.

The admission of the testimony complained of above must have resulted in a denial of fundamental fairness to entitle him to habeas corpus relief in this Court. Scott v. Maggio, 695 F.2d 916 (5th Cir. 1983).

> " . . . [t]he mere erroneous admission of prejudicial testimony does not in itself, justify federal habeas relief unless it is 'material in the sense of a crucial, critical, highly significant factor,' in the context of the entire trial." Menzies v. Procunier, 743 F.2d 281, 288 (5th Cir. 1984) quoting Porter v. Estelle, 709 F.2d 944, 957 (5th Cir. 1983).

Petitioner admitted that he had spanked the child with a belt on several occasions prior to her death. Any reference by the prosecutor, in light of that admission, that he had statements from six people that petitioner constantly beat the child was harmless.

Petitioner has failed to demonstrate fundamental fairness.

Petitioner additionally complains about the use, during his cross-examination, of a prior statement he gave in connection with the Arkansas case. He claims that the prosecutor introduced the statement without first establishing at trial that the statement was voluntary.

Petitioner failed to establish prejudice. The burden of proof in an habeas application is upon the habeas petitioner. Walker v. Maggio, 738 F.2d 714 (5th Cir. 1984), cert.

denied, ___ U.S. ___, 105 S.Ct. 793, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983). Petitioner has set forth no facts which would suggest that the prior statement was not voluntary.

13. PETITIONER'S SENTENCE IS EXCESSIVE AND DISPROPORTIONATE

14. PETITIONER'S SENTENCE IS ARBITRARY AND CAPRICIOUS

15. ELECTROCUTION IS A CRUEL AND UNUSUAL MEANS OF PUNISHMENT

16. PETITIONER'S SENTENCE IS INVIDIOUSLY DISCRIMINATORY

17. CAPITAL PUNISHMENT IS AN EXCESSIVE PENALTY

18. THE CUMULATIVE EFFECT OF VIOLATIONS OF PETITIONER'S RIGHTS IS IN ITSELF A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

The grounds for relief raised in the above six claims are conclusory in nature. Petitioner offers no support in fact or law to justify their consideration.

RECOMMENDATION

It is recommended that the application for writ of habeas corpus filed on behalf of petitioner, Robert Sawyer, be DENIED and that the stay of execution be VACATED.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 8 day of September, 1986.

/s/ Ronald A. Fonseca
RONALD A. FONSECA
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER	CIVIL ACTION
VERSUS	NUMBER: 86-223
FRANK BLACKBURN, WARDEN	SECTION: "I" (4)

ORDER

The Court, after considering the petition, the record, the law applicable to the case, and the Magistrate's Finding and Recommendation, hereby approves the Magistrate's Finding and Recommendation and adopts it as its opinion, with the comments and corrections noted herein.

In view of the serious nature of the petitioner's allegations pertaining to the trial court's appointment of counsel with less than five years experience in violation of Article 512 of the Louisiana Code of Criminal Procedure, the Court makes the following additional comments:

The petitioner contends that the trial court's noncompliance with Article 512 of the Louisiana Code of Criminal Procedure deprived him of equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution. We find it unnecessary to reach the merits of the petitioner's equal protection and due process claims, because even if the trial court's appointment of counsel with less than five years experience violated the petitioner's Fourteenth Amendment rights, the record reveals that the error was harmless beyond a reasonable doubt. Because we assume for argument's sake that an error was committed, we

must now engage in a two-part analysis: (1) Can this type of error ever be treated as harmless, and (2) if so, was the violation harmless in this case.

Discussing the purpose and the application of the federal harmless error rule, the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), noted: "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman* 386 U.S. at 23. The *Chapman* court gave examples of such "basic" constitutional rights: the right to counsel, *Gideon v. Wainwright*, 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); the right to be tried by an impartial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); and the right to have coerced confessions deemed inadmissible at trial, *Payne v. Arkansas*, 356 U.S. 560 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). By contrast, there are other constitutional errors "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless. . . ." *Chapman*, U.S. at 22.

The petitioner contends that the trial court's appointment of counsel with less than five years experience violated one of his "basic" constitutional rights therefore making a harmless error inquiry improper. Furthermore, the petitioner asserts that the harmless error principle can *never* be applied to due process of equal protection claims. We find no merit in petitioner's arguments. A due process or equal protection error, like most other constitutional errors, can be held harmless. *See Cancler v. Maggio*, 550 F.2d 1034 (5th Cir. 1977); *Hills v. Henderson*, 529 F.2d 397, 401-02 n.8 (5th Cir. 1976). The only time a

harmless error inquiry is not appropriate is when the constitutional right violated is included in *Chapman's* "so basic to a fair trial" category. Any right to five-year counsel in a capital case is not included in this category.

Our next inquiry is whether the trial court's appointment of counsel with less than five years experience constitutes harmless error in this case. The *Chapman* court pronounced that an error is not harmless where there is a "reasonable possibility" that the error complained of "might have contributed to the conviction". *Chapman*, 386 U.S. at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)). The Court placed the burden upon the state to prove that the error was harmless. *Chapman*, 386 U.S. at 24. Although the Supreme Court continues to rely upon *Chapman* in its harmless error decisions, the Court has shifted its inquiry from whether the error "might have contributed to the conviction" to whether there was overwhelming independent evidence of guilt. Under the revised test, an error is harmless where, absent the error, the evidence was so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hasting*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96, 108 (1983); *Brown v. United States*, 411 U.S. 223, 230-32, 93 S.Ct. 1565, 1569-70, 36 L.Ed.2d 208, 215 (1973); *Milton v. Wainwright*, 407 U.S. 371, 377, 78, 92 S.Ct. 2174, 2177-78, 33 L.Ed.2d 1, 6-7 (1972); *Harrington v. California*, 395 U.S. 250, 254,89 S.Ct. 1726, 1728, 23 L.Ed.2d 284, 288 (1969). This overwhelming independent evidence test is consistent with the purpose of the harmless error rule as stated in *Chapman* – to "block setting aside convictions for small errors or defects that have little, if any, likelihood of

having changed the result of the trial." 386 U.S. at 22. Moreover, the United States Fifth Circuit has recognized the overwhelming independent evidence test as the proper harmless error standard. *Germany v. Estelle*, 639 F.2d 1301 (1981), *Harryman v. Estelle*, 616 F.2d 870 (1980).

After examining the record, and the effect of the trial court's noncompliance with Article 512 in this particular case, we conclude that ny [sic] error committed by the trial court in not appointing five-year counsel was harmless beyond a reasonable doubt.

In light of the recent United States Supreme Court ruling in *Lockhart v. McCree*, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) which addressed the same issue as that raised by Mr. Sawyer in ground ten of his application for habeas corpus relief, we find it necessary to comment upon the effect of that decision in the case at hand.

The petitioner has alleged that the state trial court's removal of a juror who expressed opposition to the death penalty deprived him of the right to have his guilt or innocence determined by a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution. In January of 1986, this Court stayed the execution of the petitioner pending a ruling on the same issue by the United States Supreme Court in *Lockhart v. McCree*. The supreme Court rendered its decision on May 5, 1986. The *Lockhart* court held that the removal of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors does not violate

the requirement that a jury must represent a fair cross section of the community.

After carefully reviewing the record and transcript in this case, we conclude that the petitioner's claim is without merit. The record supports the state trial court's determination th : the juror's opposition to the death penalty would have prevented her from properly and impartially applying the law to the facts, thereby substantially impairing the performance of her duties as juror.

The Court makes the following corrections to the Magistrate's Finding and Recommendation:

Page 1, lines 15-16: the citation should read *"Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)".

Page 6, lines 18: "even" should read "ever".

Page 7, line 31: "grounds" should read "ground".

Page 11, footnote 4, line 4: The citation should read: *"Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 n.1 (La.1976)".

Page 14, line 5: the citation should read "McCrae v. Blackburn, 793 F.2d 684, 688 (5th Cir. 1986)".

Page 14, line 6: "more" should read "less".

Page 24, line 9: "of itself" should read "in itself".

Page 30, line 18: "[d]oes" should read "does".

Page 30, line 20: the citation should read "28 U.S.C. §2254".

Page 34, line 37: "merely" should read "nearly".

Page 35, line 25: "the" should read "this".

Page 37, line 24: "the" should read "that".

Page 39, line 15: a comma should follow "specific intent".

Page 42, footnote 8 line 10: "inapposit" should read "inapposite".

Page 44, lines 15-16: the citation should read "*Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)".

Page 45, line 9: "constitutinal" should read "constitutional".

Page 45, footnote 9, line 6: "[a]dequately" should read "adequately".

Page 45, footnote 9 line 8: "offenses" should read "offenders".

Page 46, line 14: the citation should read "*Sawyer v. State*, 442 So.2d 1136 at 1139-40".

Page 49, line 5: "[t]he" should read "the".

Accordingly,

IT IS ORDERED that the application filed on behalf of petitioner, Robert Sawyer, is hereby DENIED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER.	CIVIL ACTION
VERSUS	NUMBER: 86-223
FRANK BLACKBURN, WARDEN	SECTION: "I" (4)

JUDGMENT

For the reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED, and DECREED that there be judgment in favor of the defendant, Frank Blackburn, Warden, and against the petitioner, Robert Sawyer, dismissing the petitioner's application for a writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stay of execution entered by this Court on January 21, 1986 be and is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ (illegible)
UNITED STATES
DISTRICT JUDGE

IT IS FURTHER ORDERED that the stay of execution entered by this Court on January 21, 1986 is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ (illegible)
UNITED STATES
DISTRICT JUDGE

Robert SAWYER, Petitioner-Appellant,

v.

Robert H. BUTLER, Sr., Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 87-3274.

United States Court of Appeals, Fifth Circuit.

June 30, 1988.

Petitioner appealed denial by the United States District Court for the Eastern District of Louisiana, at New Orleans, Henry A. Mentz, Jr., J., his petition for writ of habeas corpus. The Court of Appeals, King, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel; (2) error in violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience was harmless; and, the Court Per Curiam, held that: (3) remarks by prosecutor in closing argument at punishment stage of capital trial did not mislead jury by inducing it to feel less responsible than it should for sentencing decision.

Affirmed.

King, Circuit Judge, filed opinion dissenting in part.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, KING and DAVIS, Circuit Judges.

KING, Circuit Judge:

Robert Sawyer appeals from the district court's denial of his petition for writ of habeas corpus, and its concomitant entry of an order rescinding Sawyer's stay of execution. On appeal, Sawyer argues that his conviction for first degree murder should be reversed both because he was denied effective assistance of counsel and because the state trial court, be failing to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar for at least five years, violated Sawyer's constitutional due process and equal protection rights. In addition, Sawyer argues that the prosecutor's closing argument in the sentencing phase of his trial violated the eighth amendment by erroneously misleading the jurors concerning their role as the final arbiters of death. As we agree with the district court that Sawyer's challenges to his conviction and sentence do not warrant habeas relief, we affirm the district court's judgment.

I.

Robert Sawyer ("Sawyer") is a state prisoner currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Sawyer and Charles Lane ("Lane") were charged with first degree murder for the gruesome slaying of Frances Arwood.[1] Both were ultimately tried

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[1] The district court adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana in Sawyer's case:

> A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood

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separately. Sawyer was represented at trial by his court-appointed attorney, James Weidner ("Weidner"). Sawyer

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was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained

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was originally represented by Wiley Beevers ("Beevers"). It was Beevers who had initially brought Weidner into the

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reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

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case by asking him to assist as co-counsel. Beevers subsequently withdrew from the case when Sawyer refused to accept a plea bargain offered by the prosecutor and Weidner was left as sole counsel. Upon receiving his appointment, Weidner informed the trial court that he was not a "death-qualified" attorney because he lacked five years experience as required for appointed counsel in capital cases by article 512 of the Louisiana Code of Criminal Procedure.[2] The trial court told Weidner to get

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Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("they've killed Fran and they're trying to kill me.") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also say defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. Then the authorities arrived, they took Lane and Defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-98.

[2] Article 512 provides, in pertinent part:

When a defendant charged with a capital offense appears for arraignment without counsel, the court

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an experienced counsel to "sit" with him. Weidner managed to secure some assistance from several other attorneys, but no "death qualified" attorney was ever appointed as co-counsel. Neither party disputes the fact that the terms of article 512 were not complied with. Sawyer was convicted of first degree murder and sentenced to death by a jury on September 19, 1980.

His conviction and sentence were affirmed by the Louisiana Supreme Court. *See State v. Sawyer*, 422 So.3d 95 (La. 1982). Sawyer's petition for a writ of certiorari to the United States Supreme Court was granted and the case was remanded with instructions for the Louisiana Supreme Court to reconsider its ruling in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court again affirmed the death sentence, *see Sawyer, v. Louisiana*, 442 So.2d 1136 (La. 1983), and Sawyer's subsequent petition for writ of certiorari was denied, *see Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). At this point, Sawyer sought state habeas relief which was ultimately unsuccessful. *See Sawyer v. Maggio*, 479 So.2d 360 (La.1985); *Sawyer v. Maggio*, 480 So.2d 393 (La.1985).

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shall assign counsel for his defense. Such counsel may be assigned earlier, but mut be assigned before the defendant pleads to the indictment. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

Having exhausted his state remedies, Sawyer filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. In his petition, Sawyer argued, among other things, that he received ineffective assistance of counsel, and that the state trial court's failure to comply with article 512 violated his due process and equal protection rights. Moreover, Sawyer claimed that the prosecutor's closing argument in the sentencing phase of his trial erroneously misled the jury as to their role as the final arbiters of death and, therefore, violated the eighth amendment. After granting Sawyer a stay of execution, the district court assigned Sawyer's case to a magistrate for a hearing. On September 9, 1986, the magistrate submitted his proposed findings and recommended to the district court that Sawyer's petition be denied and the stay of execution be vacated. With respect to Sawyer's ineffective assistance of counsel claim, the magistrate concluded that Sawyer had failed to demonstrate that he was prejudiced by any of Weidner's allegedly deficient actions as counsel. As to the state trial court's non-compliance with article 512, the magistrate began by noting that the state trial judge, after the evidentiary hearing, concluded that the violation is not fatal to a capital conviction when the defendant actually received effective assistance of counsel. The magistrate, therefore, refused to reach the issue of whether Sawyer's due process and equal protection rights were actually violated "since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705

(1967)." Finally, the magistrate concluded that the prosecutor's remarks in his closing argument during the penalty phase were distinguishable from those condemned in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), as violative of the eighth amendment. Moreover, after concluding that "[r]eference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty," the magistrate went on to conclude that since "there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different, "resentencing would be inappropriate.

On April 8, 1987, the district court issued its ruling adopting the magistrate's findings and recommendations in an order incorporating several amendments to the magistrate's opinion.[3] The district court also examined, in greater detail, the question of whether *Chapman's* harmless error analysis applies to the alleged constitutional violations in the instant case. The district court concluded that a *Chapman* analysis was appropriate since the state trial court's failure to appoint counsel with five years experience could not be classified as a violation of constitutional rights "so basic to a fair trial" as to preclude the harmless error inquiry. The district court found no merit in Sawyer's assertion that harmless error analysis can never be applied to due process or equal protection

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[3] For the balance of this opinion, we will refer to the magistrate's findings and recommendations, as corrected by the district court, and the district court's additions to the magistrate's report collectively as the district court's conclusions.

errors. Finally, the district court found that the state trial court's appointment of counsel with less than five years experience in the instant case was indeed harmless since the evidence against Sawyer was so overwhelming as to establish his guilt beyond a reasonable doubt. Sawyer filed timely notice of appeal and was granted a certificate of probable cause to appeal and a stay of execution pending appeal. We have jurisdiction under Title 28, United States Code, section 2253.

II.

On appeal, Sawyer raises three challenges to his confinement and sentence. First, Sawyer argues that he was accorded ineffective assistance by his "inexperienced appointed counsel, who was no lawfully qualified to represent a capital defendant," in violation of the sixth amendment. Next, Sawyer argues that the state trial court's failure to comply with article 512 violated Sawyer's constitutional due process and equal protection rights. He contends that the district court erred in applying a harmless error analysis to his claims for they are related to the integrity of the trial process itself and, as such, are not proper subjects for a *Chapman* inquiry. Finally, Sawyer contends that certain improper remarks by the prosecutor in closing arguments at the sentencing phase of Sawyer's trial erroneously misled the jury as to their role in the death penalty determination and, therefore, violated the eighth amendment as interpreted in *Caldwell*. Sawyer also takes issue with the district court's imposition of a prejudice requirement on his *Caldwell*

violation claims. We will consider each of these arguments in turn.[4]

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[4] Sawyer also argues briefly that since the jury was allowed to weigh an aggravating circumstance that was later held to have been improperly submitted, his death sentence was imposed in violation of the eighth amendment. Specifically, the jury found that Sawyer had previously been convicted of an unrelated murder because he was indicted in Arkansas for second degree murder in the killing of a child, and pled guilty to involuntary manslaughter for that crime. The Louisiana Supreme Court, however, ruled that a conviction for involuntary manslaughter could not support a finding that Sawyer had previously been convicted of an unrelated murder. *Sawyer*, 422 So.2d at 101. The Louisiana Supreme Court concluded that the evidence of Sawyer's prior conviction was properly admitted, however, and did not inject an arbitrary factor into the sentencing proceeding. *Id.* at 104. Sawyer's argument to the contrary is of no moment. As we have stated:

> The fact that an invalid statutory aggravating circumstance has been found does not constitutionally impair a death sentence under the Louisiana procedure where the jury has also found another aggravating circumstance which is supported by the evidence and is valid under the law and of itself suffices to authorize the imposition of the death penalty.

James v. Butler, 827 F.2d 1006, 1013 (5th Cir.1987); *see also Byrne v. Butler*, 845 F.2d 501, 501,514-15 (5th Cir. 1988).

Sawyer does not dispute that the jury properly found two other aggravating circumstances, namely that the crime was committed in a particularly heinous manner and that it occurred during the perpetration of arson. The Louisiana Supreme Court concluded that the evidence was clearly sufficient to support the jury's findings with respect to those aggravating circumstances, *Sawyer*, 422 So.2d at 101, and "[t]hat

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III.

A. Ineffective Assistance of Counsel

Sawyer points to a number of alleged deficiencies in Weidner's performance at trial as support for his allegation of ineffective assistance of counsel. Specifically, Sawyer notes that Weidner: (1) failed to ask the jurors about their attitudes towards the death penalty during voir dire; (2) objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase; (3) failed to object to several inadmissible, inflammatory remarks by the prosecutor; (4) produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as his chief defenses to negate the specific intent required for first degree murder; (5) failed to make a closing argument at the guilt phase of trial; and (6) failed to prepare a competent penalty phase presentation.

Sawyer's claims of ineffective assistance of counsel must be evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.

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court's determination is entitled to great weight in our review," *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987). In fact, Sawyer does not argue that the evidence was insufficient to support the other aggravating circumstances. Those aggravating circumstances were sufficient to authorize the imposition of the death penalty and Sawyer has not challenged their legal validity in this case. Sawyer's sentence, therefore, was not constitutionally impaired by the submission of the invalid aggravating circumstance. *See Byrne*, at 515.

2052, 80 L.Ed.2d 674 (1984). The test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and second, a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair and reliable trial. *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir.1987) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). The burden that *Strickland* imposes on a defendant is severe. *Procter v. Butler*, 831 F.2d 1251, 1255 (5th Cir.1987). In order to satisfy the deficiency prong of the *Strickland* test, for example the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 935, 93 L.Ed.2d 985 (1987). Given the almost infinite variety of possible trial techniques and tactics available to counsel, we must be careful not to second guess legitimate strategic choices which may now, under the distorting light of hindsight, seem ill-advised and unreasonable. We have stressed that, "great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.' " *Martin*, 796 F.2d at 816 (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987)).

In evaluating whether counsel's alleged errors prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, the defendant must demonstrate

"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. "It is not our role to assume the existence of prejudice." *Czere v. Butler,* 833 F.2d 59, 64 (5th Cir. 1987). On the contrary, *Strickland* requires that the defendant affirmatively prove prejudice. *Id. Strickland* also authorizes us to proceed directly to the question of prejudice. Therefore, if Sawyer fails to demonstrate prejudice, the alleged deficiencies in Weidner's performance need not even be considered. *See Strickland,* 466 U.S. at 698-99, 104 S.Ct. at 2070; *Schwander v. Blackburn,* 750 F.2d 494, 502 (5th Cir.1984). Since both the performance and prejudice components of he ineffectiveness inquiry are mixed questions of law and fact, we must make an independent determination of whether the representation accorded Sawyer by counsel passed constitutional muster. *Ricalday v. Procunier,* 736 F.2d 203, 206 (5th Cir.1984); *Trass v. Maggio,* 731, F.2d 288, 292 (5th Cir.1984). With these considerations in mind, we now turn to the merits of Sawyer's contentions.[5]

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[5] In addition to his specific allegations of Weidner's ineffectiveness, Sawyer also contends that Weidner's failure to meet article 512's standards for death qualification rendered his assistance as counsel unreasonable *per se* under "prevailing professional norms." *See Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065. Sawyer asserts that "prejudice from this form of inadequate representation may be presumed." We need not address the first contention for we do not agree with Sawyer that counsel's failure to meet the state law standard was presumptively prejudicial. In support of this proposition, Sawyer relies on language from *Strickland* to the effect that prejudice may be

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With respect to Sawyer's objections to voir dire, we need not decide whether counsel's failure to question prospective jurors about their views on the death penalty was professionally unreasonable because Sawyer has failed to demonstrate prejudice. Sawyer does not dispute the fact that the State questioned the prospective jurors on this point. Rather, Sawyer asserts that because "the actual value of the rights [counsel] so casually sacrificed cannot be measured in concrete terms," *Strickland* would excuse his failure to affirmatively demonstrate – or concretely allege – prejudice from counsel's actions. Sawyer's novel interpretation of *Strickland* is unsupported by authority and runs counter to our interpretation of that case. Sawyer also alludes to the prejudice which resulted

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presumed: (1) where "prejudice . . . is so likely that case by case inquiry is not worth the cost;" and (2) where the impairment of the sixth amendment right is "easy to identify and, for that reason . . . easy for the government to prevent." *See id.* at 692, 104 S.Ct. at 2067. Sawyer's reading of *Strickland* as establishing a generally applicable two-pronged test for presumptive prejudice is clearly in error. The Court in *Strickland* included the aforementioned language merely to illustrate why it presumes prejudice where there has been an actual or constructive denial of the assistance of counsel altogether, or where the state has prevented counsel from assisting the accused during a critical stage of the proceedings. *See id.* (citing *United States v. Cronic,* 466 U.S. 648, 659 & n. 25, 104 S.Ct. 2039, 2047 & n. 25, 80 L.Ed.2d 657 (1984)). The state trial court's failure to comply with article 512 did not result in an actual or constructive denial of the assistance of counsel. Therefore, we are unwilling to extend *Strickland's* limited relaxation of the prejudice requirement to the facts of this case. Sawyer's claims are subject to the general requirement that the defendant affirmatively prove prejudice.

from counsel's failure to rehabilitate veniremen who were excused because of their views contrary to the death penalty. Sawyer fails, however, to demonstrate that rehabilitation was possible. Unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of. We find no merit in Sawyer's allegations that counsel's voir dire performance constituted ineffective representation of counsel.

At trial, Weidner objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase. Sawyer asserts that he was prejudiced by this objection because "[w]ithout this information, the jury would never realize that a conviction for second degree murder carried a mandatory life sentence, so that a vote against first degree would both remove the possibility of a death sentence and also insure permanent incarceration." By objecting to the jury's receipt of this information, Sawyer argues, Weidner deprived his client of any realistic opportunity for a second degree murder conviction and a chance of avoiding the penalty phase of trial. The district court, however, concluded that Sawyer's argument was without merit since "it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder," and because Sawyer's "contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence."

Once again, Sawyer has failed to affirmatively demonstrate prejudice. He has not shown a reasonable probability that, absent Weidner's objection to the jury's

learning of lesser penalties, the jury decision would have been different. We note first that the evidence adduced at trial was more than ample to support the jury's determination that Sawyer was guilty of first degree murder.[6] Moreover, Sawyer fails to demonstrate a reasonable probability that the jury would have returned a verdict of guilty to either of the lesser offenses. Finally, as for avoiding the penalty phase of trial in hopes of securing a term

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[6] As the district court noted, "[Sawyer] did not seriously contest at trial his involvement in the beating and burning of the victim." In any event, the testimony of Cynthia Shano, an eyewitness to the incident, as well as the other testimony and physical evidence introduced at trial, provided a sufficient factual underpinning for the jury's verdict. The Louisiana Supreme Court found that: (1) "[t]here was . . . ample evidence from which a rational juror could have concluded beyond a reasonable doubt that [Sawyer] was engaged in the perpetration of aggravated arson;" (2) Sawyer's actions evinced the specific intent to inflict great bodily harm; and (3) the evidence was "plainly sufficient" to support the conviction. *State v. Sawyer*, 422 So.2d at 99. "That court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987).

Sawyer's chief defense at trial was that he lacked the specific intent to commit first degree murder due to intoxication. In reviewing this claim, the Louisiana Supreme Court concluded that "the jury reasonably rejected the defense." *State v. Sawyer*, 422 So.2d at 99. The Louisiana Supreme Court went on to hold that "[t]here was ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found that [Sawyer] acted with specific intent, despite his excessive consumption of alcohol." *Id.* Our review of the record shows this conclusion well supported by the evidence. Sawyer has failed to demonstrate otherwise.

of life imprisonment, Sawyer had consistently refused to accept such an offer by way of a plea bargain.[7]

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[7] Sawyer's assertions of prejudice are further belied by Weidner's testimony at the state habeas hearing. At the hearing, Weidner gave the following explanation for his actions:

A. . . . .

> My reasoning was that I didn't want the jurors to know the penalty for manslaughter was, you know, was twenty-one years. I didn't want them to know that. And that was basically a concession to Robert Sawyer. He was – Robert was insisting that we argue for manslaughter. And in light of the facts of the case, you know, and I explained to Robert I had, you know, "You're asking me to blow whatever credibility I may be able to build with the jury by doing that, especially if they find out that it's a twenty-one year sentence. You know, it's a relatively light sentence: they're going to figure out real quick that you, you know, with the other things, that you could be out of jail relatively soon if they find you guilty of manslaughter." So, kind of as a compromise between Robert, you know, I agreed we won't let them know what any of the penalties are. Let's try to set it up so that the jury knows that it's death or something else."

Q. So, Mr. Sawyer's anticipation in that area consisted of his instructing you to argue for manslaughter, and not for second degree murder?

A. Robert had consistently – he had been informed as late as the morning we began the trial that he could plead guilty to first degree murder without the death penalty. And he consistently refused and said "You tell them I will plead guilty to manslaughter and nothing else."

Next, Sawyer contends – however perfunctorily – that Weidner's failure "to object to inadmissible, inflammatory statements by the prosecutor" constituted an example of Weidner's prejudicial representation. Sawyer complains of Weidner's failure to object "to the prosecutor's use of facts not in evidence during voir dire, which facts were never established at trial." Specifically, Sawyer complains of references to the use of a hammer in the commission of the crime. The district court concluded that the prosecutor's reference to the hammer, when "viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict." Moreover, at trial, Weidner objected to the testimony of a state witness who alluded to the use of a hammer during the attack, and requested a mistrial. The trial court denied the request but instructed the jury that "until now there has been no testimony regarding any hammer by any other prior witness so I am going to ask you to disregard those comments and that statement by the witness and don't let that statement prejudice Mr. Sawyer in any way." Sawyer's assertion, therefore, is without merit.

Sawyer's next objection to Weidner's performance concerns counsel's use of expert testimony to support Sawyer's intoxication and toxic psychosis defenses. Sawyer complains that Weidner failed to secure his own expert witnesses and instead relied on "state" experts – psychiatrists who had been appointed to a pre-trial lunacy commission charged with determining whether Sawyer was competent to stand trial – who gave damaging testimony. Each of the psychiatrists in question examined Sawyer for approximately half an hour in connection

with the competency proceeding and concluded that Sawyer understood the nature of the charges against him and could assist his attorney in his defense. Weidner was successful in eliciting testimony from them which supported the toxic psychosis defense.[8] In his habeas

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[8] The following excerpts from the testimony at trial are instructive:

> Q. [By Weidner to Doctor Albert DeVilliere] Doctor, on approximately September the 27th, 1979 at some time around the time of 8:00 o'clock in the evening, Robert Sawyer went out to various lounges and began drinking. He drank a combination of MD 20/20 wine, shots of straight whiskey, beer, continued drinking without sleep from say approximately 8:00 p.m. in the evening, all night, his condition has been described at approximately 7:00 a.m. the next morning on September 28 when arriving home he was staggering drunk, barely able to walk.
>
> A. What time?
>
> Q. Approximately 7:00 a.m. in the morning. This is after being drunk all night long, continued to drink MD 20/20 wine at that time. At some time during the next five to six hours some very heinous acts occurred. At approximately 1:30 in the afternoon Robert Sawyer was described as sitting on the floor with his legs crossed looking glassy eyed and appearing to be in a stupor. This description given by a lay person such as myself, not by any physician.
>
> . . . .
>
> With the facts given to you from that hypothet, Doctor, can you render an opinion as to the condition you believe Robert Sawyer was in during the time.

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petition, Sawyer complains that these opinions were based upon a set of hypothetical questions only, and that

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> A. Well based on this information it is very possible a person under a great deal of alcohol and drinking continuously and assuming that the condition described is described by a person is fairly reasonable, a fairly reasonable individual who can assess the situation, you could see he was somewhat of a toxic psychosis. That he was probably, you can't say definitely, but that he probably was suffering with a toxic psychosis.
>
> . . . .
>
> Q. Doctor, a person who is suffering from toxic psychoses is it possible for them to form an intent or to actively desire something to happen?
>
> A. If you make the diagnosis of toxic psychoses it would hardly be likely that that person could form intent to do anything but he is liable to act out in a number of different ways.
>
> . . . .
>
> Q. Now Doctor, in layman's terms could a person in this state, in other words in the state we have described with this amount of alcohol be in a stupor, I'm talking about the layman's definition of forming an intent or actively desiring something to happen, could they do that?
>
> A. If you describe a person having the toxic psychoses it is highly unlikely they would be able to do that. Then you have, they could form intent in doing things, their behavior would not be erratic. They could have planned out behavior.
>
> . . . . . .

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Weidner should have procured an expert who could have testified as to the actual effect of alcohol on Sawyer. As the district court noted, "[Sawyer] does not suggest that type of examination would produce the type of results he seeks or that those results would even be obtainable." In addition, Doctor Albert DeVilliere, one of the two experts, testified both at trial and during the sanity hearing that a physician would have to have been at the scene of the crime during its commission to be in a position to render an opinion on Sawyer's intent or the effect of toxic psychosis on that intent at the time of the crime. Finally, as the district court concluded, Sawyer has failed to demonstrate sufficient evidence that he suffered from toxic

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Q. [By Weidner to Doctor Genevieve Arneson] Would you give us that opinion?

A. Well it is my opinion if Mr. Sawyer drank that much alcohol and his behavior towards the victim is as described by witnesses –

Q. Speak up.

A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, then it would be my opinion that he was, he was psychotic and it was a toxic psychosis secondary to the alcohol.

Q. Doctor, when a person is in a toxic psychosis are they able to form intent?

A. No, not in the usual sense.

psychosis to support his claims. His assertions on this point, therefore, are without merit.

Sawyer also points to Weidner's waiver of closing argument at the guilt phase of trial. Sawyer asserts that "[a] failure to give a closing argument constitutes a clear breakdown in the adversary process under [*Strickland*] as the jury must infer that the defense counsel who waives argument has abandoned his client's case, and has nothing to say because he believes him to be guilty." Weidner testified during the state evidentiary hearing that his deliberate decision to dispense with closing argument was based on two separate considerations. First, having dealt with the prosecutor in other trials, Weidner knew that the prosecutor tended towards "mild" closing arguments and "saved all of his big guns" for rebuttal. Therefore, "all [Weidner] could see closing argument was going to do in the guilt phase of the trial was give [the prosecutor] a chance to come back behind [him], show them the picture again . . . and just make it worse." Second, Weidner realized the strong case the state had against Sawyer as to his guilt and felt that the best hope for salvaging anything for Sawyer was in the penalty phase, where Weidner hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk his credibility with the jury by advancing arguments that the jury might perceive as unsupportable.

The district court concluded that "[w]hile an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do not find that to be the result in the case before us." We agree that the waiver of closing argument

was not prejudicial on the facts before us. Weidner believed the evidence against Sawyer to be "overwhelming." That view seems to have been shared by all of the attorneys familiar with the case. Beevers, for example, was "convinced that there was overwhelming weight of evidence" against Sawyer and "[he]was concerned . . . about the high probability of a death penalty should [Sawyer] proceed to trial." Samuel Dalton, an attorney who testified for Sawyer at the state habeas evidentiary hearing, also recalled "that the evidence of the homicide was overwhelming." Moreover, we note that closing argument was not needed to organize and explain the defense position. The district court concluded that, "[u]nder the circumstances, the jury could not help but to have understood the nature of Sawyer's defense." After a thorough review of the record, we find no error in the district court's conclusion that the jury was fairly apprised of the nature of Sawyer's defense during voir dire and Weidner's opening statement, and that the testimony of defense witnesses as to aspects of the defense theory was simple and direct.

Sawyer's assertions of prejudice are unsupported by the record. He has failed to demonstrate what counsel might have said at closing that would have a reasonable probability of changing the result of the trial and therefore, in light of Weidner's tactical considerations and the strong evidence against Sawyer, we are unprepared to find that the waiver of closing argument here was prejudicial.

Finally, Sawyer contends that Weidner failed to prepare a competent penalty phase presentation. Specifically, Sawyer point to Weidner's alleged failure to conduct

sufficient investigation and uncover relevant mitigating evidence. Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. For example, Sawyer complains that Weidner could have called other family witnesses who would have been available to testify about mitigating circumstances. Yet, Sawyer neither describes the substance of that potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law. He also complains that Weidner did not spend enough time preparing the witnesses to testify. It is clear, however, that brevity of consultation is insufficient to warrant habeas relief. *Schwander*, 750 F.2d at 499.

Sawyer also points to Weidner's closing argument as an example of attorney incompetence. In that closing, Weidner reiterated several dominant themes of his case: (1) that the jury bears a great responsibility and that they should be lenient by not "killing" Sawyer; (2) that the death penalty is improper under any circumstances; and (3) that Sawyer lived through a difficult childhood, had been in a mental hospital and had been drunk during the commission of the offense. While Weidner's closing was, as the district court noted, cursory and perfunctory, Sawyer has failed to affirmatively demonstrate prejudice. The closing was adequate to inform the jury of the defense's position. In addition, Sawyer has not articulated how Weidner's closing affected the jury's decision or could have been improved. Weidner's penalty phase presentation was imperfect but Sawyer has failed to demonstrate that it was constitutionally improper under *Strickland*.

For the foregoing reasons, we conclude that since Sawyer has failed to affirmatively demonstrate prejudice from any of Weidner's allegedly deficient actions as counsel, Sawyer's ineffective assistance claim must fail.

B. Equal Protection and Due Process

Sawyer claims that the state trial court's refusal to comply with the terms of article 512 violated his rights to equal protection. We need not, and most certainly do not, reach the question of whether this violation of state law actually rose to the level of an equal protection violation. Even if Sawyer could prove an equal protection violation, that violation would still be subject to a harmless error analysis and, under such an analysis, would clearly fail.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court rejected the notion that errors of constitutional dimension necessarily require reversal of criminal convictions. *Id.* at 21-22, 87 S.Ct. at 826. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *see also Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986). Despite the strong interests that support the harmless error doctrine,[9] however, the Court has

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[9] As the Court stressed in *Van Arsdall*:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to

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recognized that some constitutional errors require reversal without regard to the evidence in the particular case. *Rose*, 106 S.Ct. at 3106. This limitation recognizes "that there are some constitutional rights *so basic to a fair trial* that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-828 (emphasis added).

The Court in *Rose* sought to clarify this notion:

> The State of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

Rose, 106 S.Ct. at 3106 (citations omitted). Harmless error analysis, therefore, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* (citing *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436). As the Court stated in *Rose*, "[e]ach of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, or denied it altogether."

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> decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Van Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436 (citations omitted).

Rose, 106 S.Ct. at 3106 n. 6. Therefore, "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.* at 3106-07. Sawyer has failed to overcome that presumption.

We agree with the district court that a state law right to "death qualified" counsel of five years experience is not included in *Chapman's* "basic to a fair trial" category. Sawyer concedes that the right to a five year attorney is not itself a federal constitutional right. He argues, however, that "the state's arbitrary abrogation of that right may give rise to an equal protection . . . violation." This federal constitutional right, the argument continues, is basic to a fair trial under *Chapman* "in the context of a breakdown in the state-guaranteed trial machinery in a capital case." We do not agree. The alleged constitutional violation in the instant case neither aborted the basic trial process nor denied it altogether, for Sawyer received the effective assistance of counsel.[10] "The thrust of the many

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[10] The Court in *Rose* placed a great deal of emphasis on the error's potential effect on the factfinding process at trial. *Rose*, 106 S.Ct. at 3106. Specifically, the Court emphasized the deleterious effect which errors such as judicial bias or denial of counsel might have on the composition of the record. *Id.* at 3107 n. 7. Where the error in question does not affect the record, "[e]valuation of whether the error prejudiced respondent . . . does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence." No such difficult inquiries are required in the instant

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constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments." *Id.* at 3107. Recognizing that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, we conclude that the state trial court's failure to comply with article 512 does not compare with the kind of errors that have been found to automatically require reversal of an otherwise valid conviction. Sawyer's equal protection claim, therefore, was properly subjected to a harmless error analysis by the district court.

Having determined that a harmless error analysis is appropriate in this case, we must turn to the question of whether the state trial court's appointment of counsel with less than five years experience was indeed harmless. An error is harmless where, after reviewing the facts of the case, the evidence adduced at trial, and the impact the constitutional violations had on the trial process, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96 (1983); *Germany v. Estelle*, 639 F.2d 1301, 1303 (5th Cir. March 1981), *cert. denied*, 454 U.S. 850, 102 S.Ct. 290, 70 L.Ed.2d 140 (1981); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.) *cert. denied* 449 U.S 860, 101 S.Ct. 161, 66 L.Ed.2d

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case. The failure to appoint five year counsel did not affect the composition of the record in such a way as to prevent an appellate court from evaluating the potential harm to Sawyer.

76 (1980). Given the overwhelming evidence of guilt presented at Sawyer's trial, we agree with the district court that the state trial court's error was harmless beyond a reasonable doubt. Sawyer's equal protection claim, therefore, must fail.

Sawyer's due process claim is also meritless. Where there has been a violation of state procedure, the proper inquiry "is to determine whether there has been a constitutional infraction of the defendant's due process rights which would render the trial as a whole 'fundamentally unfair.'" *Manning v. Warden, Louisiana State Penitentiary*, 786 F.2d 710, 711-12 (5th Cir. 1986) (quoting *Nelsen v. Estelle*, 642 F.2d 903, 906 (5th Cir. Unit A April 1981)). In order to show that his trial was fundamentally unfair, Sawyer must demonstrate that some prejudice resulted from the state trial court's failure to appoint counsel with five years experience. *See Manning*, 786 F.2d at 712. As we explained earlier, Sawyer has failed to demonstrate prejudice and, therefore, his claim must fail.[11]

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[11] In the instant case, the district court applied a harmless error analysis to Sawyer's due process claims and found that any alleged violation was in fact harmless. We have found that there was no due process violation, since Sawyer's trial was not rendered fundamentally unfair by the state trial court's failure to appoint death-qualified counsel. Therefore we need not decide whether the district court's analysis was appropriate. We note that there are certain conceptual difficulties inherent in applying a *Chapman* analysis to a due process claim for, if the violation of state law rendered the trial fundamentally unfair, it would seem that the violation could never be harmless. Because we find no due process violation in the case at bar, however, we see no need to reconcile the conceptual difficulties, or to determine whether harmless error analysis can ever be appropriately applied to a due process claim.

C. *Caldwell Violation*[12]

Finally, Sawyer maintains that certain remarks by the prosecutor in closing argument at the punishment stage of his trial violate the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and require that his sentencing process be redone.

Caldwell is a rule of narrow application. It applies only to comments that mislead a jury in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision. *Darden v. Wainwright*, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15. The rule is well illustrated by the case in which it was laid down.

In *Caldwell*, the defendant had murdered the female proprietor of a small, rural bait and grocery store in the course of a robbery. Defense counsel, unable to find much comfort in relevant fact or law, took refuge in rhetoric, dwelling at some length on the Sixth Commandment, the Savior, the Crucifixion, mercy, forgiveness and certain of the less desirable aspects of being electrocuted. In response, the prosecuting attorney attacked the defense for cynically heaping undue responsibility upon the jury, while the judge concurred - overruling an objection to the argument and directing its continuance:

> **ASSISTANT DISTRICT ATTORNEY:** Ladies and Gentlemen, I intend to be brief. I'm in complete disagreement with the approach the

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[12] The remainder of the opinion and the result represent the views of the panel majority, Judges Gee and Davis. The views of Judge King are set forth in her appended dissent.

defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know - they know that *your decision is not the final decision*. My God, how unfair can you be? *Your job is reviewable. They know it*. Yet the . . .

COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, *go on and make the full expression so the Jury will not be confused*. I think it proper that the jury realizes that it is *reviewable automatically* as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, *insinuating that your decision is the final decision* and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and *as Judge Baker has told you*, that the decision you render is *automatically reviewable* by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.

472 U.S. at 325-6, 105 S.Ct. at 2637-38 (emphasis added).

The Supreme Court, speaking through Justice Marshall – whose consistent view has long been that capital punishment is forbidden by the Constitution in any case whatever – declared this capital sentence unenforcible because it was imposed by a jury that had been misled by the judge and prosecutor about its critical and central role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

A considerable extension of *Caldwell* would be required to accommodate Sawyer's contentions. In our view, a most critical factor in *Caldwell* was the trial judge's approval and encouragement of the prosecutor's tendentious response to defense counsel's spread eagled oratory.[13] As our Brethren of the Eleventh Circuit have observed,

> Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus . . . mandating reversal."

Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987).

The Supreme Court took a similar view of the passage, observing that the judge "not only failed to correct

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[13] No criticism is implied; counsel had few, if any, other courses open to him and did what he could for his client with his back to the wall.

the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. The comparable proceedings here, while falling short of perfection as do most actual trials, are a far cry from those in *Caldwell*. The respect in which they approach it most closely is in the remarks of the prosecutor; in all other respects of significance, they resemble if not at all. We do not condone the remarks in question and we shall discuss them in a moment. Before doing so, however, we think it appropriate to attempt to put the rule of *Caldwell* into a broader context and to sketch out a general approach for dealing with alleged breaches of it.

A general survey of the authorities indicates, as common sense supports, that the *Caldwell* problem results from prosecutorial attempts to counter a particular set of last-resort arguments by the defense in capital cases. Given that in most such cases verdicts must be unanimous, it necessarily follows that, when all else seems lost, counsel may seek to persuade at least one juror (if no more) that: he or she is being asked to "kill" the defendant, that killing is always wrong, that even evidence that seems absolutely conclusive is sometimes not, that at its best human judgment is fallible, that if the defendant is erroneously executed no correction of the error is possible, and that at all events mercy is better than retribution. Taken together, these are formidable arguments, arguments that can be made in any case whatever, arguments all of which are in varying degrees true. One response which they sometimes evoke from the prosecutor is an

exhortation to the jury to view its responsibility as a joint, rather than an individual, one; and several varieties of that response were made in this case, two permissible, one dubious.

The first called on the jury to view itself as the representative of the citizenry, as "we the people," declaring by its verdict that the acts of the defendant in torturing his victim to death were intolerable and should call down upon him the full force of the law. Another such argument appealed to their group spirit as jurors, assuring them that they did not stand alone in whatever they did but rather functioned together as an institution:

> It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so.

So far, so good; fair argument.

The next sentence, however, embarks upon a far different and more dubious sort of "joint responsibility" argument, one that vaguely and generally reassures the jury that "if you are wrong in your decision, believe me, there will be others who will be behind you to either agree with you or to say you are wrong. . . ." Who these "others" were, the jury was not told. In addition, at various points in the argument the prosecutor improperly referred to the jury's verdict as a "recommendation," and at another as "only the initial step." No objection was made by the defense at any of the foregoing points.

Following them, however, defense counsel advised the jury in his closing argument that:

> The decision whether Robert Sawyer lives or dies is in your hands. . . .
>
> I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person. . . . I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

After the prosecutor's closing argument, in which he advised the jury that it really had no choice but to recommend the death penalty, "no matter how unpleasant or how difficult this type of decision may be for you to make," the judge charged the jury in standard form, directing them to the evidence as the basis for their decision, describing their forthcoming verdict in one place as a recommendation of sentence and at the other as the imposition of one, and concluding:

> It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or life imprisonment. Go with Mr. Miller back in the jury room.

So much for the circumstances of how the jury was advised. We turn now to the law.

The vice in the argument against which *Caldwell's* rule is directed is not so much that it minimizes the jury's role in the capital sentencing procedure as that it minimizes it untruthfully.[14] It is all too likely that a lay juror

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[14] See Justice O'Connor, concurring partly and separately in *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

who has been told that panel after panel of judges – right up through the Supreme Court – will automatically "review" his verdict may believe that they "review" it as he decided it, in a plenary fashion. Were he told that the "review" it as he decided it, in a plenary fashion. Were he told that the "review" would not at all directly concern itself with the central issue before him, life or death for the accused, he would necessarily feel far less reassurance at the prospect. Where, however, a reading of the record makes clear that the jury was told that the life-or-death decision was up to them and that execution could not be exacted without their permission, we think that *Caldwell* is satisfied.

We think it plain that this was the case as to Sawyer. Both the prosecution and the defense, as well as the trial judge, advised Sawyer's jury that if it chose life imprisonment as its verdict, that was the end of the matter. The defense implored them to do so, and the prosecution – despite various ambiguous statements indicated above – told them it was up to them: "The decision is in your hands."

In the last analysis, the fundamental question, in this as in other habeas cases involving prosecutorial remarks complained of, is whether the petitioner has demonstrated that the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2472, 91 L.Ed.2d at 157 (quoting from *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In a *Caldwell* situation, however, we agree with our Brethren of the Eleventh Circuit that because the prosecutor's remarks typically amount to a mis-instruction to the jury

on the legal effect of their verdict, the reaction to them of defense counsel and trial judge are of especial importance:

> Of critical importance in *Caldwell* was the fact that the trial judge approved of the prosecutor's comments, stating that it was proper that the jury be told that its decision was automatically reviewable. *See id.; Caldwell v. Mississippi*, 472 U.S. at 325-26, 105 S.Ct. at 2638. Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus triggering the Eighth Amendment's heightened requirement of reliability in a capital case and mandating reversal.[2]

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[2] The Court in *Caldwell* noted that in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the trial judge took special pains to correct the prosecutor's impropriety, giving the jury a strong curative instruction. In contrast, in *Caldwell*, the trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell v. Mississippi*, 472 U.S. at 2645, 105 S.Ct. at 2645.

Tucker, 802 F.2d at 1295.

Indeed, the only instance of reversal for a *Caldwell* violation in our Circuit to which we are cited or which our researches have located is *Wheat v. Thigpen*, 793 F.2d 621 (1986), in which the trial court approved the making of such an argument over defense counsel's objection:

> Again, I say to you and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at it, and look at your work, and see if you've made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back, and tell us to try it over, because someone made a mistake.
>
> **BY MR. STEGAL:** May It Please The Court, I'm gonna object to that again. He's telling this jury to go ahead and do something even if it's wrong, because if it's wrong, they're gonna send it back. That's not right. I'm gonna object.
>
> **BY THE COURT:** I think the argument was allowed – it was opened up on your argument. I'll overrule it.

793 F.2d at 628.

In so stating we do not, of course, intend to say that reversal is never appropriate in the case of a *Caldwell*-type misstatement unless it has been futilely objected to or endorsed as proper or correct by the trial judge. Each case must be evaluated on its own facts and circumstances; and it is not impossible to imagine statements by a prosecutor that, even absent an objection, minimize the jury's role to such a degree as to require reversal if left uncorrected. Even in *Caldwell*, however, where the trial court had overruled an objection and in doing so expressly endorsed the prosecutor's minimizing remarks, the Supreme Court emphasized that his remarks were "quite focussed, unambiguous, and strong." 472 U.S. at

340, 105 S.Ct. at 2645. And indeed they were: beginning with two accusations of duplicity on the part of the defense, the argument proceeds through an attack focussed on the defense's "insinuating" that the jury's decision was final, invokes the trial judge's already-expressed approval of its somewhat misleading statements, and winds up by assuring the jurors that their decision is "automatically reviewable by the Supreme Court." By contrast, the prosecutor's vague references in today's case to "others who will be behind you" and the like pale into relative insignificance.

The prosecutor in today's case indulged in no claim that the defense was disingenuously or cynically attempting to mislead the jury, as did his comparable figure in *Caldwell*. Nor did counsel raise any objection, futile or otherwise, to any of the prosecutor's remarks to which Sawyer now takes exception; and the trial court neither approved nor endorsed them. By contrast to the prosecutor's statements in *Caldwell*, which were quite focussed, unambiguous and strong – trumpeting automatic review by the Supreme Court and accusing the defense of deliberately misleading the jury as to its role – these were vague and ambiguous. And although we agree with the federal district court that the prosecutor's remarks complained of were improper, we also agree that they did not constitute reversible error – error that so infected the trial as to deny due process.[15]

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[15] The dissent in *Tucker* argued for a "no effect" standard for reversal, based on a concluding phrase at 472 U.S. 341, 105 S.Ct. at 2646 in the *Caldwell* majority opinion, "Because we

(Continued on following page)

IV.

For the foregoing reasons, we AFFIRM.

KING, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that the prosecutor's undeniably improper remarks about the finality of the death penalty determination did not violate the eighth amendment as interpreted and applied by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). I have several major concerns with the majority's analysis. First, by applying the fundamental fairness test of *Donnelly v.*

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cannot say that this effort [to minimize the jury's sense of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the eighth amendment requires." 802 F.2d at 1298.

There is no gainsaying that the phrase appears in *Caldwell*, or that it can be read as Judge Kravitch and her two companions in dissent would read it. For a variety of reasons, however, we are not persuaded that the Court intended to impose such a well-nigh impossible burden upon the State as one to show, on pain of reversal, that any remark by a prosecutor in argument that might have a tendency to minimize the jury's sense of responsibility in a capital case had "no effect" on its sentencing decision. Such a test, for example, would make objecting a doubtful tactic, for an objection might bring a correcting instruction or one to disregard, thus removing the remark as a valid ground for appeal. Nor do we see how such a "no effect" test can lie in bed with the requirement, reiterated after *Caldwell* in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144, 157 (1986), that to obtain habeas relief on the basis of improper remarks by the prosecutor, petitioner must show that they so infected the trial as to deny due process.

DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), instead of the "no effect" test of *Caldwell*, the majority has reviewed the prosecutor's comments in this case under the wrong standard. Second, by holding that "a most critical factor in *Caldwell* was the trial judge's approval" of the prosecutor's remarks, the majority has adopted an artificially narrow and incorrect interpretation of *Caldwell* – an interpretation which effectively eviscerates the holding in that case. Third, the majority has also mischaracterized the prosecutor's comments here in order to force them outside the ambit of *Caldwell*. And finally, the majority has erroneously implied that other remarks by the trial court, prosecutor and defense counsel were sufficient to cure the comments of any constitutional impropriety.

The Prosecutor's Argument

The majority opinion gives the facts of the alleged *Caldwell* violation short shrift. But I think it is important to understand exactly what the prosecutor said here. The comments at issue were made by the prosecutor in his closing argument at the sentencing phase of Sawyer's capital trial. The prosecutor, in describing the jury's role, remarked:

> The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States,* that you the people as a fact finding body from all the facts and

> evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation* so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplies).

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day,* is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. *All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

> It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong* so I ask that you do have the courage of your convictions (emphasis supplied).

Caldwell, Donnelly and Darden

In *Caldwell*, the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 105 S.Ct. at 2639. The Court noted that the capital sentencing scheme is premised on a "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' [which allows the] Court to view sentencer discretion as consistent with – and indeed as indispensable to – the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Id.* at 330, 105 S.Ct. at 2640 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The Court went on to specify a number of "specific reasons to fear substantial

unreliability as well as bias in favor of death sentences when there are state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.[1] Turning to the facts before it, the Court concluded that the prosecutor's comments sought to give the jury a

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[1] Initially, the Court recognized that "[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do – limits that jurors often might not understand." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640. The Court also noted that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can freely 'err because the error may be corrected on appeal.' " *Id.* at 331, 105 S.Ct. at 2641 (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. The sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather, the decision would present "the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns" – namely, the desire to avoid responsibility for the decision. *Id.* Finally, given the fact that a capital sentencing jury is "made up of individuals placed in a very unfamiliar situation and called on to make a difficult and uncomfortable choice," an uncorrected suggestion that the ultimate determination of death rests elsewhere presents "an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 105 S.Ct. at 2642.

view of its role in the capital sentencing procedure that was fundamentally incompatible with the eighth amendment's heightened need for reliability. *Id.* at 340, 105 S.Ct. at 2645. As the Court "[could not] say that [the State's] effort had no effect on the sentencing decision," it was compelled to vacate the death sentence. *Id.* at 341, 105 S.Ct. at 2646.

In reaching its conclusion, the Court was careful to distinguish, on two separate grounds, the fourteenth amendment fundamental fairness inquiry of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), from the case before it. First, the trial judge in *Donnelly* had agreed that the prosecutor's remarks in that case were improper and had given the jury a strong curative instruction. By contrast, in *Caldwell*, the trial judge not only failed to correct the prosecutor's remarks, but in fact openly agreed with them. *Caldwell* 472 U.S. at 339, 105 S.Ct. at 2645. Second, the prosecutor's remarks in *Donnelly* were ambiguous and did not so prejudice a specific constitutional right as to amount to a denial of that right. The remarks in *Caldwell*, in contrast, "were quite focused, unambiguous, and strong" and "were pointedly directed at the issue that [the] Court has described as 'the principal concern' of [its] jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." *Id.* at 340, 105 S.Ct. at 2645 (citation omitted).

The Court subsequently clarified the reach of *Caldwell* and *Donnelly* in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Darden*, the Court was confronted by a variety of challenges to the prosecutor's closing argument at the guilt phase of a capital

murder trial. The Court relied on *Donnelly* in treating the relevant question as "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1871). The *Darden* majority was quite careful, however, to distinguish the facts in front of it from those in *Caldwell*.[2] *The Darden* Court specifically limited *Caldwell* "to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 106 S.Ct. at 2473 n. 15. As the prosecutor's comments in *Darden* did not mislead the jury as to its role in the sentencing decision, *Caldwell* was inapplicable.

Standard of Review

I differ with the majority on the appropriate standard by which to review the comments at issue here. The

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[2] In *Darden*, the Court wrote that:

> There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.

Darden, 106 S.Ct. at 2473 n. 15.

majority, relying on *Darden* and *Donnelly*, holds that the fundamental question, in this case as in other habeas cases involving improper prosecutorial comments, is whether the petitioner has demonstrated that the remarks rendered the trial fundamentally unfair so as to deny due process.[3] A fair reading of *Caldwell* and *Darden* cannot support this conclusion.

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[3] The genesis of this proposition may be found in the Eleventh Circuit's decision in *Tucker v. Kemp*, 802 F.2d 1293 (11th Cir. 1986) (en banc), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). In *Tucker*, the court "borrowed" the prejudice prong of *Strickland* in order to apply the *Donnelly* fundamental fairness standard to *Caldwell*-type violations. *See Tucker*, 802 F.2d at 1295. That decision was roundly criticized by three judges in dissent. The dissenting opinion in *Tucker* discussed a number of shortcomings in the Eleventh Circuit's approach. The dissent noted, for example, that *Strickland* and *Caldwell* are fundamentally different in their assignment of the burden of proving prejudice. *Tucker*, 802 F.2d at 1298 (dissenting opinion). Unlike *Strickland*, *Caldwell* places the prejudice burden on the State. "Once the petitioner has shown that the prosecution attempted to minimize the jury's responsibility at the capital sentencing hearing, the state must show that 'this effort had no effect on the sentencing decision.' " *Id.* (quoting *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646). The dissent also stressed that while "the government is not responsible for, and hence not able to prevent, [defense] attorney errors that will result in reversal," *see Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067, "the state *can* control prosecutorial conduct and, in the capital sentencing context, is constitutionally obligated to do so." *Tucker*, 802 F.2d at 1298 (dissenting opinion). Finally, the dissent found it significant that the Supreme Court itself "did not apply its *Strickland* prejudice analysis to Caldwell's claim of prosecutorial misconduct at sentencing but instead reaffirmed the long line of cases requiring heightened reliability in capital sentencing proceedings." *Id.*

In *Caldwell*, the Court wrote: "Because we cannot say that this effort [to minimize the jury's sense of responsibility for determining the appropriateness of death] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341, 105 S.Ct. at 2646. The majority, while recognizing that the phrase exists and that the "no effect" test is a plausible interpretation of the Court's language, concludes, for a variety of reasons, that the Court could not have meant to place a higher burden on the State in an eighth amendment *Caldwell*-type situation than would otherwise be borne under the due process jurisprudence of *Donnelly* and its progeny. I find the majority's reasoning unpersuasive.

The majority argues that the adoption of the "no effect" test would impose a "well-nigh impossible burden upon the State." According to the majority, the State would be forced to show that *any* remark which tended to minimize the jury's sense of responsibility in a capital case had no effect on the sentencing decision. That is not so. In order to qualify as a *Caldwell* violation, the prosecutor's remarks concerning the jury's rule must be "focused, unambiguous and strong." *Id.* at 340, 105 S.Ct. at 2645. Moreover, the remarks would typically be made at the sentencing phase of trial rather than during voir dire, *see Byrne v. Butler*, 845 F.2d 501, 501, 509 (5th Cir. 1988), or during the guilt-innocence stage, *see Darden*, 106 S.Ct. at 2473 n. 15. Finally, the remarks must not be corrected by an appropriate instruction from the trial court. *Caldwell's* "no effect" test, therefore, is limited to a subset of particularly forceful prosecutorial comments on a narrow topic, generally presented to a capital jury at the

sentencing phase of trial, which are not corrected by the trial court. So, while the burden on the State may in fact be "well-nigh impossible," it is borne only in a narrow class of cases.

The majority also argues that the "no effect" test cannot be squared with *Darden's* reaffirmation of the *Donnelly* test in *most* cases involving improper remarks by a prosecutor. The principles of *Caldwell*, however, were not applicable in *Darden*. *Darden*, 106 S.Ct. at 2473 n. 15. Since the prosecutor's comments in *Darden* could not have misled the jury into thinking that it had a reduced role in the sentencing process, any eighth amendment argument was unconvincing and the Court felt free to apply the more generally applicable due process standard of review. *Darden* did not hold that the *Donnelly* standard should be applied to *Caldwell* violations. If it had, the Court would not have needed to go to such great lengths to distinguish *Caldwell*.[4] *See id*. It is clear, therefore, that in the peculiar eighth amendment context of the *Caldwell* violation, a stricter standard of review applies.[5] Prosecutorial

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[4] By reviewing Justice Blackmun's dissenting opinion in *Darden*, which was joined by three of the other four members of the *Caldwell* majority, the error in the majority's analysis can be readily discerned. In *Darden*, the dissent charged that the Court rejected "the 'no effect' test set out in *Caldwell*" without identifying which standard it was using. *Darden*, 106 S.Ct. at 2480 (Blackmun, J., dissenting). The Court responded to the dissent's charges by distinguishing *Caldwell* so that it could apply the *Donnelly* standard to the facts before it. At no point, however, did the Court take issue with the dissent's characterization of the *Caldwell* standard as a "no effect" test.

[5] Justice Rehnquist, in his dissenting opinion in *Caldwell*, clearly believed that the Court had rejected the *Donnelly*

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comments which truly qualify as *Caldwell* violations cannot be reviewed under the *Donnelly* standard.[6]

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standard. Justice Rehnquist "[found] unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the [prosecutor's] statements," and concluded that "[a]lthough the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of capital punishment, it does not follow that every proceeding that strays from the optimum is *ipso facto* constitutionally unreliable." *Caldwell*, 472 U.S. at 350-351, 105 S.Ct. at 2650-51 (Rehnquist, J., dissenting). Justice Rehnquist chided the Court for not heeding the directives of *Donnelly* and for not applying a fundamental fairness test. *Id*.

[6] The panel's discussion of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3103, 92 L.Ed.2d 460 (1986), underscores the error in the majority's adoption of a fundamental fairness standard in this case. In *Chapman*, the Court recognized that some errors necessarily render a trial fundamentally unfair. *Rose*, 106 S.Ct. at 3106. There are certain constitutional protections so basic to a fair trial that without them a criminal proceeding cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and the criminal sanction may not be regarded as fundamentally fair. *Id*. Such errors either abort the basic trial process or deny it altogether. *Id*. at n. 6. The *Caldwell* violation presents a clear example of a breakdown in the trial process. The pernicious effects of focused, unambiguous and strong prosecutorial remarks concerning the jury's rule in the sentencing process and the inevitability of appellate review are impossible to measure. Consequently, where such remarks are left uncorrected by the trial court, there is an intolerable danger that they affected the sentencing decision. For all the reasons reviewed by the Court in *Caldwell*, such remarks create an unacceptable risk of systemic breakdown, thereby poisoning the reliability of the death sentence.

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Nature of a Caldwell Violation

I also differ with the majority's description of the nature of what has come to be called a *Caldwell* violation. Not content with *Darden's* express limitation of *Caldwell* to a particular type of prosecutorial comment at the sentencing phase of trial, the majority would further restrict the reach of *Caldwell* to those rare instances in which the trial court expressly approves the prosecutor's improper remarks. Essentially, the majority would make the trial court's imprimatur a prerequisite to finding a *Caldwell* violation. The majority's position is based on a tortured reading of *Caldwell*.

The majority ignores the fact that the Supreme Court framed the *Caldwell* issue throughout the majority opinion solely in terms of the prosecutor's remarks:

> In this case, *a prosecutor urged the jury* not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari . . . to consider petitioner's contention that *the prosecutor's argument* rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's 'heightened need for reliability. . . .' "

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Given that the eighth amendment demands a heightened degree of reliability in any case where the State seeks to take the life of a defendant, the prosecutor's remarks necessarily rendered the proceedings fundamentally unfair. It is our inability to measure the effect of such remarks, combined with the very grave threat to the integrity of the proceedings posed by such remarks, that militates in favor of the "no effect" test.

Caldwell, 472 U.S. at 323, 105 S.Ct. at 2636 (emphasis supplied). The majority opinion in *Caldwell* is divided into approximately thirteen parts and subparts, and the only mention of the trial court's endorsement of the prosecutor's remarks is in Part IV-C of the opinion in which the Court sought to distinguish *Donnelly*. While the Court did note that the trial judge had approved the remarks in the case before it, it did not establish that fact as a prerequisite to its ultimate condemnation of the prosecutor's actions. Rather, the Court identified *two* important factors which distinguished *Donnelly*. First, the Court looked at the trial court's actions and found that, unlike in *Donnelly*, the trial court not only failed to correct the improper remarks, it also endorsed them. *Id*. at 339, 105 S.Ct. at 2645. Next, the Court looked to the character of the remarks and determined that the prosecutor's comments differed from those in *Donnelly* because they were "focused, unambiguous and, strong" and because they prejudiced a specific constitutional right, i.e., an eighth amendment right. *Id*. at 340-41, 105 S.Ct. at 2645-46. The Court went on to confirm that such comments, *if left uncorrected*, might so affect the fundamental fairness, of the sentencing proceeding as to violate the eighth amendment. *Id*.

Given *Caldwell's* overwhelming emphasis on the character and effect of the prosecutor's argument itself,[7] the

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[7] Justice O'Connor, in her concurring opinion, noted that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id*. at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring). Justice O'Connor's concurring

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question of whether the trial court endorsed the comments must be viewed as merely a factor in a larger inquiry. A proper inquiry must focus on the nature of the prosecutor's remarks themselves *and* on the character of the trial court's response to those remarks. Moreover, an evaluation of the trial court's response is not limited to the question of whether the trial court endorsed the remarks. Where this not the case, the Court's references to curative action would be superfluous for silence would be sufficient medicine for what ailed the proceedings. I do not think *Caldwell* can fairly be read, therefore, as holding that the trial court's endorsement of the prosecutor's remarks is a prerequisite to finding an eighth amendment violation.

Nature of the Prosecutor's Remarks

The majority, casting the prosecutor's remarks in a more favorable light than they merit, weaves the threads of an admittedly "improper" argument into a harmless tapestry of vague, disjointed and forgiveable[8]

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opinion focused exclusively on the prosecutor's remarks, never once mentioning the trial court's endorsement of those remarks.

[8] The majority also strives to justify the prosecutor's remarks on the ground of practical necessity. Prosecutors need such arguments, the majority suggests, to deal with the "formidable" argument, typically urged as a "last-resort" by struggling defense counsel, that the decision whether the defendant merits execution rests with each individual juror, that human judgment is not infallible, that mistakes can be made and that

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prosecutorial comments. My own review of the record has led me to conclude that the prosecutor's remarks in the instant case are sufficiently similar to those found constitutionally wanting in *Caldwell* as to merit vacation of Sawyer's sentence.

In the instant case, the prosecutor told the jury:

> Don't feel like you are the one, because it is very easy for defense lawyers to try and make each

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death is one error which cannot be corrected. The majority points out, as it must, that such arguments are "in varying degrees" true. Those weighty factors, however, are precisely the sort of considerations which society has entrusted the jury to weigh in reaching its decision. Those decisions are at the core of the heightened need for reliability demanded by the eighth amendment of sentencing proceedings in capital trials.

The prosecutor is free to emphasize the collective nature of the jury decision. He is also free to emphasize that the defendant himself bears the responsibility for the consequences of his actions. The prosecutor most certainly made those arguments in this case. The prosecutor is not free, however, to diminish the jury's sense of the finality of their decision by repeatedly alluding to the specter of appellate review. By doing so, the prosecutor may well leave the jurors with the notion that their moral judgment in favor of death will be reviewed for error. *See Caldwell*, 472 U.S. at n. 7, 105 S.Ct. at n. 7. This may hold true even when the prosecutor has stressed that "the decision" is in the jury's hands for "the decision" in that case would be the decision to send a message, or the decision to start the ball rolling, or the decision that the jury wants the case, reviewed. *See Id.* at 330-333, 105 S.Ct. at 2640-41. It would not be the decision demanded by society and required by the eighth amendment: that the defendant merits execution because death is the appropriate punishment for the crime he has committed.

> and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong. . . .

While the majority is arguably correct in dismissing the first portion of this comment as a permissible "joint-responsibility" argument, it is remiss in not recognizing the answer to the query it asks with respect to the latter portion: who are the "others" who will be behind the jury to agree with their decision or correct them if they are wrong? The answer is suggested in an earlier comment by the prosecutor:

> . . . what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body- . . . are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty.

Just as the *Caldwell* prosecutor referred to the ultimate reviewability of the jury's determination, so too did the prosecutor here make several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. As if the intended suggestion was not already clear enough, the prosecutor went on to hammer home his point by explicitly referring to judicial review and by couching his description of the jury's

decision in language bespeaking possibility rather than finality:

> You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day. . . . All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.

The contested remarks here are precisely the sort of comments condemned in *Caldwell* as tending to impart to the jury a view of its role in the capital sentencing procedure that is fundamentally incompatible with the eighth amendment's heightened need for reliability in the death sentence determination. It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecutor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous and strong." *See Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645. The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination. The message of non-finality was clear.

The Trial Court's Response

Having determined that the prosecutor's remarks were inappropriate under *Caldwell*, a question remains

whether subsequent action by the trial court was sufficient to preclude reversal. *See Caldwell*, 472 U.S. at 339-40, 105 S.Ct. at 2645; *See also Bell v. Lynaugh*, 828 F.2d 1085 (5th Cir.), *Cert. denied*, ___ U.S. ___, 108 S.Ct. 310, 98 L.Ed.2d 268 (1987). The majority notes that the trial court delivered a standard form jury instruction informing the jury that it was their responsibility to deliver a sentence of death or life imprisonment. While that much is true, it is equally clear that the trial court did little if anything to correct the damage that was done. This is particularly so with respect to the prosecutor's comments regarding appellate review. Even if the trial court's instructions left the jury with the view that they had an important role to play, they did nothing to undermine the prosecutor's suggestion that the jury's determination would be reviewed by an appellate court to assure its correctness. *See Caldwell*, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n.7.

This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument. I do not presume to establish a general standard by which to judge the efficacy of a trial court's curative instructions in a *Caldwell* violation context. I merely note that in the instant case, the trial court's instructions[9] were

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[9] The majority, in an effort to bolster its position that the prosecutor's remarks were later "cured", points to the fact that *defense* counsel informed the jury that "[t]he decision whether Robert Sawyer lives or dies is in your hands." That remark was patently insufficient to relieve the jurors of any mistaken impressions they might have held as to their role in the death

(Continued on following page)

insufficient to disabuse the jury of the notion that final responsibility for the sentencing decision might lay elsewhere.

In summary, because I believe that the prosecutor's effort to minimize the jury's sense of responsibility for determining the appropriateness of death cannot be said to have had no effect on the sentencing decision, I believe that the writ must be granted as to the sentence imposed upon Sawyer. I dissent from the majority's decision to affirm the district court's denial of the writ.

(Continued from previous page)

penalty determination. In fact, any initial confusion by the jury might well have been exacerbated by defense counsel's espousal of a position contrary to that which the prosecutor seemed to embrace. The jury may have understood the remark, made just after the prosecutor had finished insinuating that the jury's decision was not final, to signify the existence of a true dispute on the rule of the jury. Therefore, defense counsel's remark, when considered along with the prosecutor's earlier comments, may well have added to the cloud of uncertainty billowing around the jury about its own role. Consequently, the majority's reliance on the curative properties of defense counsel's remark is misplaced.

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

MARCH 30, 1989

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

GILBERT F. GANUCHEAU
CLERK

Ms. Elizabeth W. Cole
Attorney at Law
701 Freret St.
New Orleans, LA 70118

Ms. Dorothy Pendergast
Asst. District Attorney
24th Judicial District Ct.
New Courthouse
Gretna, LA 70054

No. 87-32-74 - Sawyer v. Butler
(USDC No. CA-86-0223-"I"(4)

Dear Counsel:

The En Banc court requests that counsel in this case submit additional briefs discussing the relevance of the Supreme Court's recent decision in *Teague v. Lane*, 57 U.S.L.W. 4233 (1989), to Sawyer's petition. The Court wishes to know whether *Teague* precludes Sawyer from raising *Caldwell* issues in a collateral attack on his conviction. Counsel should address the following questions, although they need not limit themselves to these questions:

1. Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test? In

answering this question, please discuss the significance of the Louisiana cases dealing with prosecutorial argument that diminishes the responsibility of a capital jury. *See, e.g., Steve v. Willie*, 410 So. 2d 1019 (La. 1982). The Court wishes to know whether these cases rest upon state law rules, or upon the Eighth Amendment to the Constitution, and what effect, if any, they have upon the newness of Sawyer's *Caldwell* claim for *Teague* purposes.

2. Does *Teague* apply to collateral attacks upon a sentencing proceeding in a capital case?

3. Does *Caldwell* announce a rule that falls within the "fundamental fairness" exception to the *Teague* rule?

Sawyer's brief should be filed on or before May 12. Louisiana's brief should be filed on or before May 19.

Very truly yours,
GILBERT F. GANACHEAU, Clerk
by /s/ Amanda K. Vockroth
Amanda K. Vockroth
Case Manager

AKV/dme

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3274

ROBERT SAWYER,
Petitioner-Appellant,

versus

ROBERT H. BUTLER, SR., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(August 15, 1989)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.*

HIGGINBOTHAM, Circuit Judge:

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* When this case was orally argued before and considered by the court, Judge Rubin was in regular active service. He participated in both the oral argument and the en banc conference, and with Judge King in the preparation of her dissenting opinion. He took senior status, however, on July 1, 1989. Based on his understanding of the Supreme Court decision in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 718, 80 S.Ct. 1336 (1960), he considers himself ineligible to participate in the decision of this case, but he adheres to the views in Judge King's dissent.

Robert Sawyer was sentenced to death by a Louisiana jury on September 19, 1980 for the brutal slaying of Frances Arwood. Today we decide his appeal from the denial by a United States District Court of his petition for writ of habeas corpus. We have elsewhere recorded the long history of Sawyer's efforts to overturn his conviction.[2] Sawyer's attack has now boiled down to three arguments. First, he argues that his court-appointed trial counsel was ineffective in certain respects. Second, and closely related to the first, he argues that his conviction should be set aside because his appointed counsel had not been licensed for five years as required by La. Code Crim. P. art. 512. Finally, he argues that the prosecutor in closing argument misled the jury about its role in capital sentencing as condemned by *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

A panel of this court rejected Sawyer's contentions, dividing over the *Caldwell* issue, and we took the case *en banc*. We reject Sawyer's first two contentions for the reasons stated by the panel, affirm the district court's denial of Sawyer's petition for relief from his conviction, and turn to the difficult question of whether Sawyer is entitled to a new sentencing hearing because the state misled the jury about the jury's responsibility in deciding whether Sawyer should be executed.

Part I summarizes the facts. In Part II we sketch the constitutional principles that frame our inquiry. We next in Part III address the statutory overlay to the constitutional issues, as presented by the Supreme Court's recent

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[2] *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).

decision in *Teague v. Lane*, 109 S.Ct. 1060 (1989). Because we conclude that we cannot apply *Teague* without first defining the scope of *Caldwell*, we turn back in Part IV to the substantive constitutional questions. We endorse a version of Sawyer's construction of *Caldwell*. We find in Part V, however, that *Caldwell* so defined is a new rule within the meaning of *Teague*, and that *Caldwell* does not fit within either of *Teague's* two exceptions. Sawyer's *Caldwell* argument is therefore *Teague*-barred. The prosecutorial argument complained of will thus vitiate Sawyer's death sentence only if Sawyer can prevail under the earlier rule of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). In Part VI we conclude that Sawyer has no *Donnelly* claim. We therefore affirm denial of Sawyer's petition to vacate his sentence.

I

Caldwell addressed constitutional issues that arise when a prosecutor misleads a capital jury about its responsibility for the sentencing decision. The prosecutor's argument creates a possibility that the jury will decide between life and death without an appropriate sense of grave responsibility. Sawyer contends that *Caldwell* mandates a new sentencing trial any time a prosecutor taints the proceeding with a *Caldwell*-type argument, unless the argument had "no effect" upon the jury. Louisiana, however, says that a *Caldwell*-type prosecutorial argument will not generate constitutional grounds for reversal unless the argument rendered the sentencing phase "fundamentally unfair" to the defendant. Louisiana would have us focus upon effective prejudice to the defendant, rather than effective dilution of the jury's

sense of responsibility. The case turns upon this disagreement.

Sawyer's *Caldwell* claim arises out of remarks which the prosecutor made in his closing argument during the trial's sentencing phase. The details of the prosecutorial remarks are important to Sawyer's argument. We therefore repeat those remarks here. The prosecutor told the jury,

> The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States,* that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation* so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision [emphasis supplied].

The prosecutor drew the jury's attention to the brutal nature of the crime for which Sawyer stood convicted.

The prosecutor then returned to the theme of the jury's responsibility, saying

> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the judges that are going to review this case after this day,* is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact of the law of Louisiana. *All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

After arguing that a death penalty was justified in Sawyer's case, the prosecutor struck the theme of jury responsibility again, telling the jury that their mistakes could be corrected by later decision-makers:

> It's all your** doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong* so I ask that

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** This word was likely recorded inaccurately by the stenographer. From context, it is clear that the prosecutor said, "It's all *you're* doing." The two phrases sound identical, but their meanings are nearly opposite.

> you do have the courage of your convictions (emphasis supplied).

II

The problem of *Caldwell* error touches upon three of the Constitution's grandest themes. Two of these are obvious. The problem implicates federalism, because the state asserts a power to decide for itself questions of criminal procedure. *Caldwell* analysis also concerns individual rights, since the defendant contends that diminishing a capital jury's sense of responsibility subjects him to cruel and unusual punishment. The third theme is perhaps less obvious, but no less important to understanding the issues raised by a *Caldwell* claim. *Caldwell* touches the principle of popular self-government, because the direct expression of popular sentiment through juries remains an important aspect of the people's participation in the government, and a crucial check upon the state's authority to define the limits of crime and punishment.

The jury seems always to be at the center of the judicial struggle with the death penalty. This should not be surprising. Differences over the role of the jury reflect differences over the wisdom of the penalty itself. The legislative judgment specifying execution as the punishment appropriate to certain crimes embodies a confidence both about the moral principles of the community and about the capacity of the criminal justice system to resolve factual disputes. Coupled to that confidence must be an equal certitude that the jury will be able to bring the community's principles to bear, and so judge blame and guilt accurately in the individual case.

In *McGautha v. California*, 402 U.S. 183 (1971), Justice Harlan summarized how history had given expression to this deep link between the death penalty and the jury. Justice Harlan explained that legislatures "to meet the problem of jury nullification . . . did not try, as before, to refine further the definition of capital homicides. Instead, they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Id.* at 199. Justice Harlan observed that the Court had earlier concluded that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary and community values and the penal system – a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." *Id.* at 202, *quoting Witherspoon v. Illinois*, 391 U.S. 510, 519 n.5 (1968).

We have long recognized that decisions that depend essentially upon inarticulable judgment and common sense intuition are prime candidates for jury decision. Indeed, we refer to these judgments as "blackbox decisions." The sentencing decision in capital cases is born out of an inherent and unique mixture of anger, judgment and retribution, and requires a determination whether certain acts are so beyond the pale of community standards as to warrant the execution of their author. This decision to punish by death is a paradigmatic "blackbox" call. To say that the decision can at best only be guided, not determined, by a judicial instruction or lawyers' argument underscores the decision's irreducible discretionary core.

A commitment to jury resolution of these blackbox decisions reflects a commitment to submit these issues to an active exercise of practical judgment, rather than to the reified precision of legal analysis. But the jury, of course, checks not only legalism but the government more generally. It protects from punishment those defendants who are innocent in the judgment of their peers. For both these reasons, the right to trial by jury has long been cherished within our legal tradition. Blackstone commended juries as an "admirable criterion of truth, and most important guardian both of public and private liberty." W. Blackstone, 4 *Commentaries* 407. The Constitution expressly secures the right to jury trial. It is, then, neither coincidental nor surprising that the jury's integrity should be so aggressively protected in capital cases, when the stakes are so high.

Of course, the Court has since rejected *McGautha's* teaching that "[t]o identify before the fact the characteristics . . . in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204. The Court has demanded that states guide the jury's discretion. The Court has also permitted states to take some power away from the jury. But the jury's sense of gravity, and the responsible discretion it fosters, remain crucial to post-*McGautha* sentencing schemes. *Caldwell* articulates a constitutional protection against state conduct that diminishes the jury's perception of its awesome responsibility.

In this sense, *Caldwell* itself is but the trace of a more comprehensive rule, one that might have trusted jury discretion to protect individual rights and express the

scope of state power. The Court's post-*McGautha* jurisprudence has instead sought to secure individual rights by limiting jury discretion, and has deferred to the states' own restrictions upon jury power. The Constitution, after all, permits the people to speak through state law as well as through juries. Federalism, no less than jury participation, ties local penalties to local sentiment and local judgment.

Nonetheless, it is necessary to perceive the larger theme in order to understand its trace within the composition that remains. *Caldwell* stands in part for the continuing vigor of the ideals articulated by Justice Harlan in *McGautha*. *Caldwell* treats jury discretion within a framework that recognizes both federal and state limits upon the jury's power. But it is the larger whole behind the trace which accounts for *Caldwell's* peculiar nexus to the constitutional mix of individual autonomy, federalism, and populism.

Indeed, this reflection of *McGautha's* ideals in *Caldwell* forms the lynchpin of Sawyer's argument here, and was the fulcrum for the argument that divided our panel. Only if *Caldwell* harkens back to the high esteem which *McGautha* accorded jury discretion can *Caldwell* impose, as Sawyer would have it, considerably more stringent restrictions than its Due Process Clause precursor, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). *Donnelly* subjected prosecutorial argument to a generalized "fundamental fairness" standard, which would benefit Sawyer only were he able to show actual prejudice from the argument complained of. Sawyer's principal argument presupposes that the Eighth Amendment, as interpreted by *Caldwell*, puts a particular premium upon

responsible jury discretion in a proceeding that fixes punishment at life or death. It is that premium which would, on Sawyer's argument, distinguish *Caldwell* from *Donnelly*. The existence of that premium in turn assumes that a jury's deliberation may be even more crucial at the punishment phase than it is in choosing between guilt and innocence. That assumption makes sense only if, as Justice Harlan argued in *McGautha*, the jury's capacity to express moral sentiment directly is peculiarly essential to questions of capital blameworthiness.

Because Sawyer's claim comes before us by way of a habeas petition, not by direct appeal, we view the delicate constitutional mix through a similarly complex statutory overlay. The law of the habeas writ balances the vindication of constitutional rights against the state's constitutionally legitimate interest in maintaining a criminal justice system capable of producing final convictions. The Supreme Court refined anew this balance in *Teague v. Lane*, 109 S.Ct. 1060 (1989). *Teague's* rule precludes habeas petitioners from seeking to overturn their convictions on the basis of rules new by comparison with the date their convictions became final. This statutory balance provides, however, exceptions for constitutional claims of a certain character. It may therefore wrap back around the constitutional issues, and so, in Sawyer's case, back around the questions about jury responsibility in capital cases. Yet a plurality, at least, of the *Teague* Court regarded the *Teague* retroactivity inquiry as a preemptive threshold to constitutional analysis. 109 S.Ct. at 1069. *Accord, Penry v. Lynaugh*, 109 S.Ct. ___, ___ (1989) (applying *Teague* as

threshold barrier to constitutional analysis). Because *Teague* may present a threshold barrier to fuller consideration of Sawyer's constitutional claims, we begin our analysis with that case.

III

The Supreme Court did not decide *Teague* until after the *en banc* court heard oral argument in this case. At our request the parties have filed briefs regarding *Teague's* applicability to Sawyer's petition.

Teague adopts much of what Justice Harlan long advocated as the correct view of federal habeas. Under *Teague* a federal habeas petitioner attacking a final state conviction may rely only upon the law in effect when his conviction became final. There are two exceptions. First, the petitioner may rely upon a new rule if it would place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part)). The Court has since declared that this first exception also applies to rules which exempt certain persons entirely from capital punishment. *Penry*, 109 S.Ct. at ___. Second, the petitioner may rely on a new rule requiring the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty' " *Teague*, 109 S.Ct. at 1073, *quoting Mackey*, 401 U.S. at 639 (opinion of Harlan, J.) (inside quote from *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937) (Cardozo, J.)).

A majority of the *Teague* court fully subscribed to this restriction on the use of federal habeas to attack final state court convictions. *Teague* left much of the restriction's content in doubt, although some of that ambiguity was removed by the Court's later decision in *Penry v. Lynaugh*, 109 S.Ct. at ___, ___ (opinion of O'Connor, J., for the Court). In *Teague* itself, four justices concluded, in an opinion by Justice O'Connor, that the second proviso, drawn from Cardozo's incorporation formulation, should be modified to limit its scope "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 109 S.Ct. at 1076-77. The remaining justices filed four separate opinions: Justice White concurred separately, as did Justice Stevens; Justice Blackmun joined part of Justice Stevens's opinion, and added a brief writing of his own; and Justices Brennan and Marshall dissented.

Teague was not a capital case, and the plurality disclaimed any decision regarding its application to an effort by a state prisoner to overturn his death sentence. Justice Stevens joined Justice O'Connor's opinion insofar as it adopted Justice Harlan's restrictions on federal habeas. He dissented, however, from the plurality's insistence that "the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt'. . . . " *Id.* at 1081. He suggested that "a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings." *Id.* Justice Stevens noted that Justice Harlan's interest in making convictions final was "an interest that is wholly inapplicable to the capital

sentencing context." *Id.* at 1081 n.3. Justice O'Connor's plurality opinion replied that because Teague was not himself under a death sentence, the Court need not express any opinion "as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context. We do, however, disagree with Justice Stevens's suggestion. . . . As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant." *Id.* at 1077 n.3.[4]

Note three did not gain majority support, since Justice White neither joined it nor otherwise mentioned *Teague's* application to death cases. Justice Brennan's dissenting opinion, joined by Justice Marshall, assumes that the plurality would apply the new limits to death cases, and observes that "the plurality's new rule apparently would not prevent capital defendants . . . from raising Eighth Amendment, due process, and equal protection challenges to capital sentencing procedures on habeas corpus." *Id.* at 1089 n.5.

The *Penry* decision settled *Teague's* application to death cases. In Part II-A of her opinion for a fractured Court, Justice O'Connor, joined by the Chief Justice and Justices White, Scalia, and Kennedy, held that *Teague* did apply to capital cases. The plurality simply observed that the finality concerns underlying the *Teague* doctrine hold equally well in capital cases, and offered no further analysis. The four remaining Justices dissented from the relevant portion of Justice O'Connor's opinion.

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[4] Justice Blackmun joined Justice Stevens's reservations about *Teague's* applicability to death cases.

It remains unclear, however, whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted. The *Teague* plurality clearly thought that a *Teague* bar would preempt discussion of the constitutional merits. 109 S.Ct. at 1069-70, 1077. However, Justices Stevens and Blackmun, who joined the plurality to constitute a majority in favor of Justice Harlan's approach to retroactivity, expressly rejected the plurality's position on this matter. Justice Stevens, joined by Justice Blackmun, contended that the Court should proceed by "first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief." Justice Stevens went on to observe that, absent a precise formulation of the rule in question, it may be difficult to determine whether the rule is in fact "new" at all. *Id.* at 1079-80 & n.2. Finally, Justice White once again declined to join the relevant portion of the plurality opinion, leaving unclear his own position on the relation between the constitutional and *Teague* issues.

On this point, *Penry* leaves the matter unclear. A majority did join a portion of Justice O'Connor's opinion which characterized *Teague* as a rule to be applied "as a threshold matter," 109 S.Ct. at ___ (Part II-A). Indeed, in Part IV-A all nine Justices joined a portion of the opinion which included a reference to *Teague* as a threshold test. *Id.* at ___. We must take care, however, not to overstate the significance of these votes. Thus, although Justice Stevens joined Part IV-A of Justice O'Connor's opinion, he reiterated in a separate concurrence his view that the constitutional rule should be articulated before *Teague* is applied. The threshold character of the *Teague* bar was not

the primary topic of Part II-A or Part IV-A, and it would be unwise to assume that each Justice joining those parts intended that *Teague* function as a threshold barrier in every case where it applied.

More importantly, however, Justice O'Connor's own opinion mixed the *Teague* inquiry with the constitutional questions. In order to decide that Penry's requested rule was dictated by precedent, and so not new, she had to decide precisely the substantive question which divided the Justices five-to-four over Part III of her opinion: that is, the question of whether Penry's proposed rule was the best possible interpretation – let alone the interpretation "dictated by" – Supreme Court precedent. 109 S.Ct. at ___ (Part II-B). Likewise, Justice Scalia, dissenting in part and joined by the Chief Justice, Justice White and Justice Kennedy, observed that "[t]he merits of the mitigation issue, and the question of whether, in raising it on habeas, petitioner seeks application of a 'new rule' within the meaning of *Teague*, are obviously interrelated." 109 S.Ct. at ___.

The relationships that led to a mixing of the *Teague* issues and the constitutional issues in *Penry* become all the more powerful when a petitioner attempts not to establish a new rule, but to rely, as Sawyer would like to, upon a rule that is new by comparison to his own conviction yet is well established by the time of his habeas petition. In such a case, a court may have to reach the constitutional questions even to define what the petitioner complains of – in Sawyer's case, for example, "*Caldwell* error." Moreover, the court does not risk the awkward outcome of establishing a new rule in a case where it has no application. *See Teague*, 109 S.Ct. at

1077-78. The rule relied upon – for example, the rule governing *Caldwell* error – exists by the time the *Teague* issues arise in connection with a particular prisoner's petition.

Indeed, Sawyer's argument illustrates the difficulties that may arise from an attempt to separate *Teague* analysis from the substance of the constitutional claims raised. Whether *Caldwell* is a new rule, and whether *Caldwell* is a rule "implicit in the concept of ordered liberty" that implicates factual innocence, both depend in part upon what *Caldwell* means, and, more specifically, upon the relation between *Caldwell* and *Donnelly*. This dependence is made unmistakably clear by Louisiana's briefing of the *Teague* issue, which suggests that *Teague* is no bar to Sawyer's *Caldwell* claim precisely because Sawyer is wrong about the relation between *Caldwell* and *Donnelly*. If the Supreme Court had made clear that *Teague* necessarily bars an inquiry into the merits of the petitioner's constitutional claims, we would perhaps have to resolve the *Teague* issues by a conditional discussion of *Teague*'s application to what Sawyer says *Caldwell* might mean. Such a conjectural analysis of possible rules would, however, entail considerable awkwardness, do nothing to clarify the substantive law, and defeat rather than serve judicial economy – which would be the ostensible goal of any version of *Teague* that preempted some constitutional inquiries.

We thus choose to address the merits of Sawyer's interpretation of *Caldwell* before applying *Teague* to *Caldwell*. We do not mean, however, by adopting this strategy to suggest that *Teague* never bars inquiry into the constitutional merits of a petitioner's claim. It remains possible

that an application of *Teague* to a conjectural rule may be appropriate in cases where the *Teague* issues do not turn, as they do here, upon a highly precise specification of the rule in question. We leave that issue for a case in which it is properly presented, and turn to the merits of the constitutional arguments.

IV

At a general level, *Caldwell*'s import is clear. Regardless of whether the Court moves toward or away from the *McGautha* acceptance of juror discretion, the sentencing jury must continue to feel the weight of responsibility so long as it has responsibility. Lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role. For the jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of the jury function. It is not surprising then that jury arguments calculated to have that effect have long been condemned by numerous jurisdictions. *See Caldwell*, 105 S.Ct. at 2642 nn.4 & 5. *See also* Mello, *Taking Caldwell v. Mississippi Seriously*, 30 B.C.L. Rev. 283, 305-308 & nn. 100-114 (1989). The decision of the Court in *Caldwell* reflects this reality, insight born more of experience than of empirical study or abstract exposition.

In no way is the importance of *Caldwell* error diminished by the possibility that a state may dispense with the jury's sentencing power in capital cases. *See Spaziano v. Florida*, 104 S.Ct. 3154 (1984). The evil of *Caldwell*-type prosecutorial arguments is not that they divest juries of

their responsibility, but rather that they distort the jury's understanding of a power which it in fact retains. The decision-maker empowered to choose between life and death must not be relieved of the gravity attending that choice. Whether a judge or jury decides the sentence, the responsibility to decide must remain adjoined to the power to decide. It would, of course, be less likely that a prosecutor could mislead a judge, whose own knowledge of the law should overcome any misleading argument. But a judge who misunderstands the sentencing decision in a capital case creates a Constitutional defect no less significant that a jury which misunderstands its decision. *Cf. Hickerson v. Maggio*, 691 F.2d 792, 794-95 (5th Cir. 1982).

The argument between Sawyer and Louisiana does not draw into question these general observations. Sawyer contends that *Caldwell*, recognizing the unique role of the jury in capital sentencing, imposes an especially stringent procedural safeguard by requiring that the defendant receive a new sentencing hearing if the prosecutor's argument had any effect on the jury's perception of its own responsibility. Louisiana concedes the impropriety of prosecutorial argument that misleads the jury as to its role, but contends that the sentencing phase is marred by a constitutional defect only if the prosecutorial argument rendered it "fundamentally unfair." According to Louisiana, *Caldwell* did not establish a "no effect" test for constitutional error, but simply applied *Donnelly's* "fundamental fairness" test to the facts of a sentencing hearing. On this argument, *Caldwell* extends *Donnelly* to punishment proceedings without altering *Donnelly's* rule

by any reaffirmation of *McGautha's* reflections upon jury responsibility.

It is this argument which brought the case before the *en banc* court. To resolve it, we must consider *Caldwell* in some detail. We begin with the facts.

Caldwell killed the owner of a grocery store in the course of a robbery. His lawyers' plea for mercy at the sentencing phase of his capital murder trial rested on his poverty, troubled youth, and character evidence. His lawyers argued

> [E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death – the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know – an awesome responsibility.

Caldwell. 104 S.Ct. at 2637. The argument triggered the following exchanges:

> "ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . "COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.
>
> "ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.
>
> "THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.
>
> "ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so."

Id. at 2637-38. A divided Mississippi Supreme Court affirmed and the Supreme Court granted certiorari. Speaking for the Court, Justice Marshall concluded that

"it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 105 S.Ct. at 2639. He explained that the court's post-*Furman* review of state procedures "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." *Id.* at 2640. He then found "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.*

The State proposed three reasons why the prosecutor's argument should not upset the death sentence. The State argued that under *California v. Ramos*, 463 U.S. 992, 1001-06 (1983), it was free to instruct juries in capital cases about appellate processes. In part IV(a) of the *Caldwell* opinion, joined only by Justice Brennan, Justice Blackmun and Justice Stevens, Justice Marshall rejected this argument. He concluded that, unlike in *Ramos*, the argument in *Caldwell* was not relevant to a valid state penological interest and was misleading. In the *Caldwell* plurality's view, appellate review was simply not relevant to the juror's task of determining an appropriate sentence. For that reason, the prosecutor's argument that the jurors should view themselves as only taking a preliminary step in the sentencing determination served no valid state interest. Justice O'Connor's concurring opinion agreed, but refused to read *Ramos* "to imply that the

giving of *nonmisleading* and *accurate* information regarding the jury's role . . . is irrelevant to the sentencing decision." *Id.* at 2646 (O'Connor, concurring; emphasis in original). In her view the prosecutor's argument was impermissible because it misled "in a manner that diminished the jury's sense of responsibility." *Id.*

The Court next rejected the state's contention that the prosecutor's argument was a reasonable response to defense counsel's argument. The Court observed that the prosecutor's reference to appellate review did not respond to defense counsel's suggestion that a sentence of life would be without parole, nor to the defense's religious theme and plea for mercy.

Finally, and most importantly for our purposes, the Court rejected the State's contention that in any event the effect of the prosecutor's argument should be measured by the standard of *Donnelly v. DeChristoforo*, which would judge improper prosecutorial arguments to vitiate a sentencing proceeding only if they rendered the proceedings fundamentally unfair. The Court distinguished *Donnelly* on two grounds. First, the Court pointed out that in *Donnelly* the trial court gave a strong curative instruction to the jury, while in *Caldwell* the judge not only gave no correcting instruction but "stated to the jury that the remarks were proper." *Id.* at 2645. Second, in *Donnelly* the remarks were ambiguous and not focused pointedly upon " 'the principal concern' of our jurisprudence concerning the death penalty, the 'procedure by which the State imposes the death sentence.' " *Id.* (quoting *California v. Ramos*, 463 U.S. at 999).

Justice Rehnquist, joined by Justice White, dissented, contending that when the argument was placed in its full trial setting it "fell far short of telling the jury that it would not be responsible for imposing the death penalty." 105 S.Ct. at 2649 (Rehnquist, J., dissenting). Rather, "the thrust of the prosecutor's argument was that the jury was not *solely* responsible for petitioner's sentence." *Id.* at 2650 (emphasis in original). He observed that under *Ramos* there was nothing wrong with telling a jury that its decision is subject to appellate review, and that the prosecutor did not mislead the jury by suggesting that its decision would be subject to de novo review.

The division between the *Caldwell* majority and the dissenting Justices, like the division between Sawyer's argument and Louisiana's argument, turns in significant part upon the fate of *Donnelly's* "fundamental fairness" formula in capital sentencing proceedings. As we shall see, the effect upon a death sentence of *Caldwell* error and the nature of the inquiry into whether it exists, including the record sources to be examined, are entwined parts of its very definition. That is, what a reviewing court is to look for and how it is to set about judging its effect upon a criminal conviction is part of the definition of *Caldwell* error. Much of the argument here is over the ingredients of the prohibition.

Sawyer, as we have said, argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision-making so powerfully articulated in *McGautha*. Sawyer argues that the prosecutor's argument at the sentencing phase of his trial misled the jury regarding its

role. In particular, he contends that the argument unambiguously told the jury that its role was only to recommend punishment and that others would check their decision, an argument even more pointed than in *Caldwell*. Sawyer maintains that such an argument effectively renders a proceeding fundamentally unfair by definition, and that the standard of *Donnelly* is therefore inapplicable because superfluous [sic]. It follows, he argues, that he is entitled to a new sentencing hearing before a jury properly aware of its responsibility. According to Sawyer, neither a contemporaneous objection nor participation by the trial judge are prerequisites to a *Caldwell* claim. *Caldwell* mandates a new sentencing hearing so long as the court reviewing *Caldwell* error "cannot say that [the prosecutor's statements] had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 328-329. Sawyer says that in *Kirkpatrick v. Blackburn*, 777 F.2d 272, 289-90 (5th Cir. 1985), this court declared that "the no effect test applies to the state's effort to minimize the jury's sense of responsibility, not to every other improper argument." He maintains that the Supreme Court in *Darden v. Wainwright* adopted this court's position holding *Caldwell* applicable in any case where the prosecutor "mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 477 U.S. 168, 184 n.15 (1986).

As already mentioned, Louisiana contends, in essence, that *Caldwell* merely applies *Donnelly* to a case where the combination of prosecutorial and judicial action at a sensitive moment rendered the proceedings especially unfair to the defendant. Louisiana argues that

no new sentencing hearing should be ordered unless we find both that there was *Caldwell* error and that it rendered the trial fundamentally unfair. Pointing to *Darden v. Wainwright*, the State argues that Sawyer must show prosecutorial misconduct that "so infected the trial as to deny due process." *See Darden*, 106 S.Ct. at 2472 (*quoting Donnelly v. DeChristoforo*). Louisiana argues that the due process standard is applicable because the prosecutor's argument, when stripped of non-misleading statements, was not as clear and focused as in *Caldwell*. Louisiana stresses the absence both of any objection by defense counsel and of any signal from the trial judge that might have endorsed the prosecutorial misstatement.

We agree with Sawyer that *Caldwell* must be read in light of *McGautha*. The state cannot resist a conclusion that it improperly diminished a jury's sense of responsibility in its sentencing role with the argument that a jury with such diminished responsibility nonetheless did not render the proceedings fundamentally unfair. *See, e.g., Coleman v. Brown*, 802 F.2d 1227, 1238-41 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 2491 (1987); *see also Campbell v. Kincheloe*, 829 F.2d 1453, 1460-61 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 380 (1988); *Dutton v. Brown*, 812 F.2d 593, 596-97 (10th Cir. 1987) (en banc), *cert. denied*, 108 S.Ct. 116 (1987); *Mann v. Dugger*, 844 F.2d 1446, 1457-58 (11th Cir. 1988) (en banc). *Cf. Hopkinson v. Shillinger*, 866 F.2d 1185, 1226-33 (10th Cir. 1989); *id.* at 1233-38 (Logan, J., dissenting). Once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the Eighth Amendment

requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case" – and the Supreme Court has told us precisely that, *see Darden*, 106 S. Ct. at 2473 n. 15, (1986) – it is apparent that, as Sawyer contends, the *Donnelly* issue of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error.

If the state has misled the jury in the manner condemned by *Caldwell*, it can be no answer that the culprit was the prosecutor and not the judge. With either source, the error is the same. Although in *Caldwell* there was an objection and a potent affirmation of the misleading argument by the trial judge, the relevance of these events was to the question of whether the jury was actually misled. In other words, the absence of objection and trial judge participation are highly relevant to the question of whether a jury was misled, but their absence is not determinative as a matter of law of the question of whether the state misled the jury. We do not read the Court's opinion in *Darden* to the contrary.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 109 S.Ct. 1211, 1215 (1989). In short, a prosecutor's statements to the jury accurately describing its role will not support a *Caldwell* claim. At the same time, a statement can be literally true but quite misleading by failing, for example, to disclose information essential to make what was said not misleading. Indeed much of our law of fraud under the Securities Act rests on just such a reality. *See* 17 C.F.R. 240.10b-5(b).

It is suggested that, in spite of these considerations, a willingness to find *Caldwell* error from unobjected to argument by a prosecutor unwisely creates an incentive for defense counsel to not object. After all, an objection may lead to a curative instruction and any appellate point is not lost by remaining silent. The questionable validity of the assumed incentives aside, these concerns as well as the other values that lie behind our usual insistence that error be preserved are not unique to *Caldwell* error. The essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection. More to the point, the decision to entertain claimed constitutional error without a contemporaneous objection belongs in the first instance to the state, when as here, we review a state court conviction. A state may insist upon a contemporaneous objection. And, ordinarily, a federal habeas court is bound by that decision and cannot reach claims of error found by the state to have been waived. *Dugger v. Adams*, 109 S.Ct. at 1215 (1989). In short, whether to insist upon a contemporaneous objection as a matter of orderliness, as distinguished from the question of whether an objection is an element of the constitutional claim itself, is a matter for the state court.

It is suggested that even if the *Caldwell* issue must be addressed because the state reached its merits, a contemporaneous objection is an element of a *Caldwell* claim. We have concluded that a timely objection is an essential element of a claim of racial discrimination in the exercise of preemptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Jones v. Butler*, 864 F.2d 348, 369 (5th Cir. 1988) (on petition for rehearing). But the constitutional

rule in *Batson* rests on a change in the requirement of proof from that of *Swain v. Alabama*, 380 U.S. 202 (1965) (insisting upon proof of a pattern of discrimination by prosecutors in cases) to the case specific procedures of *Batson*. *Teague*, 109 S.Ct. at 1066. *Batson* assures an objecting defendant that a prosecutor striking black veniremen will articulate non-racial reasons for its decisions. An objection is plainly central to a *Batson* claim. *Caldwell*, by contrast, rests on "the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' " *Caldwell*, 105 S.Ct. at 2646. It instructs that if the State seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we cannot say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* In *Caldwell*, unlike in *Batson*, the constitutional defect – if it exists – is observable and measurable by a reviewing court even absent any objection. We reject the suggested analogy between these two very different doctrines.

In sum, we reject Louisiana's proffered definition of *Caldwell*. We do so after noting that its core is diminishing the responsibility of the jury by misdescribing its role under state law and after rejecting the suggestion that its elements include showings of fundamental unfairness, a contemporaneous objection or trial court participation.

Continuing our definition of *Caldwell* error, we turn to the question of what an appellate court looks to in gauging the state's conduct, and quickly find that the nature of the prohibition takes us a long way toward the

answer. What has been communicated to the jury by the state cannot be disentangled from the total trial scene, and thus that is our terrain. While the prosecutor's argument will often be the natural point of departure, we must turn to the opposing argument and then to instructions of the court, both in its formal charge and in any rulings on objections. The initial focus will be upon the close of the sentencing hearing, yet inquiry may proceed not only to the guilt phase but to jury selection as well. In short, a trial cannot be cabined into distinct segments. As the Supreme Court phrased it: "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

While this is inevitably a case-by-case inquiry with a broad terrain to be surveyed, there are a number of events that obviously may loom large and quickly focus the inquiry. First, the trial judge is an extraordinarly [sic] puissant figure. A direct and uncorrected misstatement to the jury that misleads the jury regarding its role will be difficult to salvage. For example, *Caldwell* error was found by the Eleventh Circuit when a trial judge told the jury that he was the ultimate determinant of whether the defendant was sentenced to death. The Circuit reached this conclusion even though the jury's role under Florida law is advisory. *Adams v. Wainwright*, 804 F.2d 1526,

1532-33 (1986), *modified on denial of rehearing*, 816 F.2d 1493 (1987), *rev'd on other grounds, Dugger v. Adams*, 109 S.Ct. 1211 (1989). Second, the absence of objection by competent counsel may suggest that the argument as it played in the courtroom was less pointed than it now reads in the transcript. Third, the argument may take on a different hue when read as a reply to opposing counsel. Fourth, the court may have mitigated the effect of counsel's argument by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence. Fifth, veniremen often receive extensive instruction during voir dire. These instructions, as well as the questions and advices of counsel, are also relevant. Finally, through the course of trial the judge may give detailed instructions to the jury about its role. Such familiar instructions are part of the message to the jury and all must be considered. We list these lines of inquiry to explain the scope of inquiry that may be required in review of asserted *Caldwell* error, without suggesting that the list is exhaustive. By definition, it is not and cannot be. Indeed, in some cases the presence or absence of error will be readily determinable solely on the basis of the prosecutor's argument and the trial judge's treatment of it.

V

A

Sawyer's conviction was final at least by 1984 when the Supreme Court denied his petition for certiorari. *See Sawyer v. Louisiana*, 466 U.S. 931 (1984). Because Sawyer wishes to rely on the Court's later decision in *Caldwell*, he

must grapple with the limitation of *Teague*. Sawyer first argues that *Teague* does not bar his argument because *Caldwell* did not announce a new rule, so that the prosecutor's argument was constitutionally infirm measured by the law in place in 1984 when his conviction became final.

The Supreme Court's decision in *Penry*, left the definition of a "new rule" in some doubt. Justice O'Connor reiterated her statement, first presented in *Teague*, that a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government, [or,] to put it differently . . . if the result was not *dictated* by precedent." *Penry*, 109 S.Ct. at ___ (*quoting Teague*, 109 S.Ct. at ___ (plurality opinion). Yet Justice O'Connor's application of this standard led Justice Scalia, joined by three colleagues, to contend that the Court had only given "lip-service" to the *Teague* standard. *Penry*, 109 S.Ct. at ___ (opinion of Scalia, J., dissenting; Part II). Justice Scalia said that "it challenges the imagination to think that today's result is 'dictated' by our prior cases." *Id.* at ___. He went on to say that "[i]f *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling," and went so far as to remark that "[it] is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same term." *Id.* at ___.

Justice Scalia's comments are especially significant because he speaks on behalf of all three Justices who joined Justice O'Connor's plurality opinion in *Teague*, and on behalf of Justice White as well. Yet, Justice Brennan, in his separate *Penry* opinion, apparently does not agree

with Justice Scalia that *Teague* has been gutted. Justice Brennan reiterates his contention, first made in his dissent from *Teague* itself, that the *Teague* rule is an "unprecedented curtailment of the reach of the Great Writ," and accuses the majority of compounding its errors by extending *Teague* to death cases.

Indeed, Justice O'Connor's application in *Penry* of *Teague*'s "new rule" formula may well have turned upon facts which she thought unique to Penry's claims. In Justice O'Connor's view, Penry sought only to compel Texas "to fulfill the assurance upon which [*Jurek v. Texas*, 428 U.S. 262 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." 109 S.Ct. at ___. Penry's claim rested on the clearly established and specific Constitutional rule that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the offense that mitigates against imposing the death penalty." Justice O'Connor concluded that the path from *Jurek* to *Penry* involved the consistent application of an established constitutional rule to, in essence, changes in the facts.

Because of these disagreements about the meaning of the *Teague* test, the Court's opinions in *Teague* and *Penry* do not immediately yield a clearly articulable definition of a "new rule." We must interpret what Justice O'Connor has said by reference to the purposes served by the *Teague*

rule. To undertake that inquiry, we first turn to the complex of concerns now accommodated within federal habeas jurisprudence.

A federal court's role in a habeas attack on a state court conviction is only to review for errors of constitutional magnitude. The Constitution commands us to defer to federalism, and so recognizes that the solemn judgment of a state's highest court enjoys a presumption of validity, which may be overcome only for failure to abide the Constitution itself. The role that remains for federal courts is by no means modest. To the contrary, viewed over the full span of history, it is rather an extraordinary reach for superintending power. Indeed, the first legislation empowering federal courts to issue a writ for state custody did not come until the Habeas Act of 1867. Until the Court's decision in *Brown v. Allen*, 344 U.S. 443 (1953), "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original proceeding. . . . "[5] Seen in this light, casting our role as that of a constitutional backstop is hardly a retrenchment, and *Teague*'s reach for finality is modest indeed.

Teague, whether applied to a capital sentence or to a more ordinary case, is by no means a return to the law that preceded *Brown v. Allen*, if indeed it is a turn in that direction at all. *Teague* rather reflects a distinct and basic judgment that, putting aside the cases falling within its two provisos, there is no fundamental unfairness inherent

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[5] *See Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., concurring).

in refusing to wield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final. Due regard for the constitutional structure of federalism, and the protection it accords to state government, counsels the opposite – that only preservation of constitutional principles justifies the intrusion.

The *Teague* judgment about the federal role acknowledges that neither finality nor federalism will condone constitutional acquiescence in the conviction of persons factually innocent of the crime charged. Our efforts to reduce the risk of convicting an innocent person are evidenced by myriad procedural safeguards and by high requirements of proof. These restrictions reflect a commitment to accurate outcomes so firm that we consciously increase the chance of acquitting guilty persons to reduce the chance of convicting the innocent. It is not surprising, then, that the Supreme Court is fairly unanimous in its view that a state court prisoner can rely upon a fundamental constitutional rule implicating factual innocence even though that rule was not announced until after his conviction became final.

It might nonetheless be contended that the Court's "factual innocence" proviso is not enough to vindicate the rights of prisoners, and that capital cases show particularly well various considerations that compel a narrow formulation of *Teague*'s "new rule" element. One reasoning along these lines might point to the inherent finality of the death penalty, and contend that the benefit of every announced constitutional rule should be given to a prisoner facing this extreme penalty. One might likewise

argue that in habeas petitions challenging a death sentence but not the underlying conviction, the state need not fear that it will have to relitigate issues of innocence and guilt on the basis of stale evidence, and so run the risk of freeing a criminal who would have been convicted by a fair and timely trial. Finally, continuing to reason against finality interests on the basis of concerns unique to death cases, one might argue that in such cases there is no danger that the state's efforts at rehabilitation will lose their focus because of the habeas process; that habeas petitioners succeed more frequently in capital cases than in other cases; and that other factors, external to the habeas system, are responsible for delays in the execution of state prisoners.

Yet unless we suppose a perfectly stable constitutional jurisprudence, it is unclear how finality could ever be achieved if these arguments are accepted at full reach. As the Court made clear in *Penry*, the order of magnitude of punishment is not relevant to *Teague*'s support of finality so long as we except rules implicating factual innocence. The "death is different" argument in this context is little more than an argument against the validity of the punishment itself. As an argument directed to the purposes of *Teague* – the matter now before us – it fails.

Of course, the penalty is different from all others in many respects. We recognize that it is the extreme of punishments when we reserve the punishment for the most extreme of crimes, as we do under our present law. Death sentences, which by their nature aim at retribution or deterrence and not at rehabilitation, obviously do implicate different state purposes than do terms of incarceration. But that the interests are different does not

imply that they are less deserving of federal deference, or that comity concerns are any less important. A state policy predicated upon the certainty of exact retribution, no less than a state policy predicated upon incarceration in a facility designed in part to rehabilitate, suffers when the prospect of punishment is confused by a series of collateral federal attacks.

Indeed, much that is unique about the law controlling death cases is in fact a powerful testament to the need for the finality-serving rules of *Teague*. The constitutionally secured rules announced for death cases by the Supreme Court since *McGautha v. California*, 402 U.S. 183 (1971), have come in such number and with such rapidity that the entire jurisprudence is fairly described as being in a state of flux. During the ten year period ending with the final day of the Supreme Court's 1988 term, it granted plenary review in sixty-seven cases and at least thirty-five of those can, with little dissent, be described as presenting issues of substantial reach. The destabilizing impact of such a sea-change in controlling law presents problems of administration unique to death cases. In the 1986 term alone, the Supreme Court acted on eighty requests for stay of execution. This undermines the argument that *Teague* has no application to death cases.

Nor is there anything inhumane in an insistence that a death-sentenced state prisoner confine his attack upon that sentence to the rules in effect when his conviction became final. So long as nothing new implicates the petitioner's factual innocence, we, confronted with the need for sureness of punishment as contrasted with the never ending uncertainty and serendipitous state of a nigh open set of rules, see little to persuade us that respect for

human dignity counsels against application of finality rules.

In light of the powerful reasons that justify the *Teague* doctrine, we see no cause to limit its application to the rare or extraordinary case. When a rule is indeed *dictated* by precedent – a word Justice O'Connor took care to emphasize in *Penry* as she did in *Teague* – then a state can reasonably be asked to anticipate its articulation, and enforcing the rule in a habeas proceeding will not intrude upon the state's legitimate interest in the finality of convictions. Otherwise, however, *Teague* must bar the rule's application. We do not, despite Justice Scalia's strong words in dissent, read *Penry* to the contrary. Instead, we believe that Justice O'Connor regarded *Penry* as a special case, one simply reapplying the rule of *Jurek v. Texas*, 428 U.S. 262 (1976) to a unique development in state law. *See Penry*, 109 S.Ct. at ___ (Opinion of O'Connor, J., Part II-B, discussing *Jurek*). Justice O'Connor honored the language of the *Teague* opinion, and we must assume she intended to honor its spirit as well.

B

Sawyer correctly observes that many state courts, including Louisiana, had before *Caldwell* developed common law rules forbidding misleading jury argument about the importance of the jury's decision. *See, e.g., Pait v. State*, 112 So.2d 380, 383-84 (Fla. 1959); *Blackwell v. State*, 79 So. 731, 731, 735-736 (Fla. 1918); *Wiley v. State*, 449 So.2d 756, 762 (Miss. 1984); *State v. Jones*, 251 S.E.2d 425, 427-29 (N.C. 1979); *State v. Gilbert*, 258 S.E.2d 890, 894 (S.C. 1979); *Hawes v. State*, 240 S.E.2d 833, 839 (Ga. 1977);

People v. Morse, 388 P.2d 33, 43-44 (Cal. 1964); *State v. Mount*, 152 A.2d 343, 35152 (N.J. 1959); *People v. Johnson*, 30 N.E.2d 465, 467 (N.Y. 1940). For example, the Louisiana Supreme Court ordered a new sentencing hearing in a 1982 capital case when, without objection, the prosecutor argued to the jury that the "buck" started with them and did not end there, and that "everything" will more than likely be reviewed by every appeals court in the United States. *State v. Willie*, 410 So.2d 1019, 1034-35 (La. 1982). But it does not necessarily follow from the circumstance that Louisiana law forbade the argument made by Sawyer's prosecutor when it was made, that the Supreme Court did not announce a "new" rule in *Caldwell*.

Sawyer's argument fails to deal with *Teague*'s explicit offer of *Ford v. Wainwright*, 477 U.S. 399 (1986), as an example of a decision that created a "new rule." *Ford* held that the Eighth Amendment prohibits states from inflicting the penalty of death on an insane prisoner. Execution of the insane was prohibited at common law. Indeed, the *Ford* Court observed that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials . . . " 477 U.S. at 406. Moreover, twenty-six states of the forty-one with a death penalty had "statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* at 408, n.2. Sawyer's reliance upon *Caldwell*'s common law roots and its relationship to the rules of several states, including Louisiana, cannot be squared with the Supreme Court's view that it created a new rule in *Ford v. Wainwright*.

There was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional

footing. *Caldwell* was certainly new in its conclusion that such arguments violated the Eighth Amendment. *See* Mello, 30 B.C.L. Rev. at 305. Of course, when Sawyer's conviction became final, *Donnelly* would have authorized federal jurisdiction over a habeas petition attacking the sentence on due process grounds. Yet, as we have seen, Sawyer persuasively contends that *Caldwell* was more than a straightforward application of *Donnelly* to new facts. Our question is then whether these changes suffice to make *Caldwell* a new rule within the meaning of *Teague*.

The *Teague* court held that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 109 S.Ct. at 1070 (emphasis in original). *Accord*, *Penry*, 109 S.Ct. at ___. We have little difficulty in concluding that so measured, *Caldwell*'s greatly heightened intolerance of misleading jury argument is a new rule within the meaning of *Teague*. Its direct impact upon the finality of state convictions is illustrated by this case.

Sawyer, however, nonetheless contends that this heightened standard for review of prosecutorial argument does not create a new rule. He has two arguments. First, Sawyer says that Louisiana not only condemned *Caldwell*-type prosecutorial argument, but did so under an Eighth Amendment standard identical to the *Caldwell* standard. For this proposition, Sawyer cites a string of Louisiana cases explaining that Louisiana's death penalty procedures were designed to comply with the Supreme Court's Eighth Amendment decisions, *see, e.g., State v.*

Payton, 361 So.23 866, 870-73 (La. 1978), *State v. Sonnier*, 379 So.2d 1336, 1370 (La. 1980), and *State v. Willie*, 410 So.2d 1019, 1032-33 (La. 1982), and another string of Louisiana cases condemning *Caldwell*-type prosecutorial arguments, *see, e.g., State v. Berry*, 391 So.2d 406, 418 (La. 1980), *cert. denied*, 102 S.Ct. 1986 (1982), *Willie*, 410 So.2d at 1034-35, and *State v. Robinson*, 421 So.2d 229, 231-34 (1982).

Yet it is one thing to say that a state, inspired by earlier constitutional decisions, had anticipated *Caldwell* as a matter of state law, and a very different matter to say that the state had recognized a *Caldwell*-type rule as a constitutional restriction on its own power. In an effort to bring the Louisiana cases within the latter category, Sawyer relies heavily on the Louisiana Supreme Court's recent post-Caldwell decision in State ex rel. Busby v. Butler, 538 So.2d 164, 173 (La. 1988). There, the Louisiana Court said it need not consider a Caldwell claim on collateral attack after rejecting a similar state law challenge on direct review, for Caldwell "did not change our previous case law." Again, however, this statement and the other remarks in Busby indicate only that the state law and Caldwell rules are coincident. The remarks do not show that Louisiana law condemned Caldwell argument because it regarded such argument as an Eighth Amendment violation. We therefore need not decide whether, if a rule is "new" as a matter of constitutional interpretation but not "new" in state interpretations of the federal Constitution, it is nonetheless "new" for purposes of the Teague bar upon collateral federal challenges to state convictions.

Sawyer next contends that this Circuit in *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir. 1985), cert. denied, 106 S.Ct. 1904 (1986), has already decided that Caldwell is not a new rule. In Moore, we held that even if the Caldwell standard were separable from the Louisiana state standard for assessing prosecutorial argument, petitioner Moore should have anticipated in an earlier habeas petition the possibility of a distinct constitutional standard. We therefore held that Moore's Caldwell argument was not "new" for purposes of the writ abuse doctrine, and stated that the doctrine would bar the argument. Sawyer's attempt to rely on Moore must fail, for the meaning of "newness" differs in writ abuse cases from its meaning in Teague cases. In writ abuse cases, the key question is whether a particular argument is being made by attorneys: the argument is not "new" if it is being made, and so should be known to attorneys. The Supreme Court makes clear, however that a rule is new for purposes of Teague if it has not been accepted at the time the petitioner's conviction became final. Teague, 109 S.Ct. at 1070. Moore thus cannot bear the freight Sawyer would put on it.

C

The *Teague* test allows two exceptions. Sawyer, however, cannot contend that the sentence imposed upon him was unlawful because the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution. He contends only that the state's sentencing procedure was unconstitutionally administered. *Teague*'s first exception,

dealing with substantive limitations upon the criminal law-making authority, therefore does not apply.

We turn, then, to the plurality's insistence in *Teague* that a new rule may be relied upon by a habeas petitioner if it both "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty" and "procedures without which the likelihood of an accurate conviction is seriously diminished." Sawyer contends that we should not in his case apply the "accurate conviction" qualification to Harlan's proviso. First, Sawyer argues that the qualification is only a plurality view. The *Penry* opinions did not discuss the "fundamental to ordered liberty" proviso, or the "actual innocence" qualification to it. However, Justice White's joinder in Justice Scalia's dissent, and in Part II-A of Justice O'Connor's opinion (which references the *Teague* plurality's formulation of the exceptions), strongly suggests that Justice White has adopted the position of the *Teague* plurality. In any event, our short answer is that pending further direction from the Supreme Court, and in particular the full view of Justice White, we should follow the course set by the plurality as best we can.

Second, Sawyer argues that confining use of new rules to those implicating factual innocence has no relevance to a jury's decision to impose a death and not a life sentence. We are not persuaded. A habeas petitioner may not escape this limitation on use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence. Rather, such a petitioner must show that the new rule insists on procedures without which the correctness of the jury's decision to punish by

death rather than by life imprisonment is seriously diminished.

We thus accept the plurality's formulation of the proviso, and turn to its application. Our task is made difficult by the newness of the amalgam of the second proviso as well as its uncertain precedential footing. Justice O'Connor's opinion for the plurality insisted that it is "unlikely that many such components of basic due process have yet to emerge." 109 S.Ct. at 1077. Justice O'Connor went on to say that these components are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus – that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods" (citations omitted). The new rule contended for in *Teague* was an extension to petit juries of the fair cross section requirement of a jury venire. The plurality opinion concluded that such a new rule "would not be a 'bedrock procedural element' that would be retroactively applied under the second exception. . . . " Id. at 1077.

While the Court has made plain that it expects to encounter few newly discovered bedrock procedural rules, it is not clear how *Caldwell*, with its condemnation of a particular type of jury argument, fits into the *Teague* scheme. This difficulty stems in part from uncertainty about *Teague*'s standard for sorting the bedrock from the host of other rules calculated to enhance the efficiency and fairness of a trial. We can immediately put aside rules that only enhance as distinguished from rules essential to

fundamental fairness. This first cut is informed by developed principles of incorporation doctrine that leave the states free of all but the core assurances, variously expressed as rejecting "tail with the hide" and "jot-for-jot" incorporation. *See e.g., Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting). For example, the Fourteenth Amendment requires Louisiana to provide Sawyer a jury and a fundamentally fair trial. Louisiana has wide latitude in its choice of procedures for doing so and few procedures are so essential as to be required by the Fourteenth Amendment. This distinction is reflected in our willingness to find errors to be harmless and our refusal to grant relief absent a demonstration not only that the rule was violated but also that its violation rendered a trial fundamentally unfair.

Caldwell manifestly implicates two principles that would be fundamental in the sense required by *Teague's* second proviso. The first is *Donnelly's* restriction requiring that a proceeding not be "fundamentally unfair" to the defendant. The second is the more expansive regard for jury discretion suggested by *McGautha*, a regard trimmed back, as we have mentioned, by the Court's later interpretations of the Eighth Amendment. Were Sawyer seeking to rely on either of these principles as new rules, his argument would be compelling. Yet *Donnelly's* principle is not new by comparison to Sawyer's conviction, and *McGautha's* general themes do not constitute a rule at all. What Sawyer seeks to rely upon is *Caidwell's* modification of *Donnelly* in light of the ideals discussed in *McGautha*. That modification is not itself so fundamental as to be "implicit in the concept of ordered liberty." After all, the only defendants who need to rely on *Caldwell* rather than

Donnelly are those who must concede that the prosecutorial argument in their case was not so harmful as to render their sentencing trial "fundamentally unfair."

A recent decision of the Supreme Court supplies additional guidance for our inquiry. In *Dugger v. Adams*, the Court decided whether Florida's procedural default rule barred Adams's *Caldwell* claim. To resolve that issue, the Court had to determine whether a "fundamental miscarriage of justice" would result if the procedural default rule were permitted to defeat Adams's *Caldwell* claim. The Court held that no such miscarriage of justice would arise.

In reaching its conclusion, the *Adams* Court wrote as follows:

> The dissent "assumes *arguendo*" that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." . . . According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," . . . the standard for showing a fundamental miscarriage of justice is necessarily satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," . . . into an all too ordinary one.

109 S.Ct. at 1217-18 & n.6.

Adams, of course, does not directly control *Teague's* application to a *Caldwell* claim. *Adams* applies a "fundamental miscarriage of justice" standard to determine whether a *Caldwell* claim might fit within an exception to the procedural default rule. *Teague* applies an "implicit in the concept of ordered liberty" and "implicating factual innocence" standard to determine whether a *Caldwell* claim might fit within an exception to the doctrine barring habeas petitioners from relying on new rules. The verbal formulae are different, and their application thus might differ, too. Moreover, the *Adams* miscarriage standard requires scrutiny of the facts of a particular case, while the *Teague* ordered liberty standard looks to the character of the general rule asserted.

Nonetheless, we must take care not to exaggerate the substantive import of these semantic differences. Similar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance upon new rules. Both doctrines recognize the importance of finality in criminal convictions. Both doctrines promote federal-state comity by requiring federal courts to defer to the integrity of state convictions. And both doctrines put a premium upon the obligation of defendants to raise all relevant arguments before their convictions become final. Indeed, in some respects *Teague* functions as a radical extension of the procedural default rule by forcing defendants to establish a new rule on direct appeal, rather than on collateral attack, if they wish to rely on such a rule. Because of the similarities between the two doctrines, it is difficult to see why a *Caldwell* violation should be sufficiently fundamental to require an exception to the "new

rule" doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Adams is also important for another reason: given the particular facts of Adams's own case, the Court's disposition of the case presupposes a judgment about the importance of *Caldwell* error to a sentencing determination. In *Adams*, as the Court noted, the trial judge "found an equal number of aggravating and mitigating circumstances." The Court made clear that there was no fundamental miscarriage of justice even though *Caldwell* error goes to the accuracy of the sentencing procedure, and even though the case was a close one. In short, the mere possibility of a close case did not make the alleged error's threat to accuracy sufficiently fundamental to warrant exemption from the procedural bar.

Sawyer's *Caldwell* claim runs into comparable problems when analyzed in light of the second *Teague* proviso. Sawyer can argue at most that there would be a possibility, absent the alleged *Caldwell* violation, of a different outcome to the jury's sentencing procedure. Yet, as we have already stated, the Court's *Teague* opinion makes quite clear that not every procedural rule affecting the accuracy of a trial will fit within the "ordered liberty" proviso. To hold otherwise would be to cling to "jot-for-jot" or "tail-with-the-hide" incorporation, and to make the "extraordinary case into the ordinary one." Instead, the examples listed by the *Teague* Court – trial by mob rule, use of perjured testimony, or the extraction of confessions through brutal torture – either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's

disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's *Caldwell* claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second *Teague* proviso.

Our extended exposition of the nature of *Caldwell* error reinforces the inferences we draw from the Supreme Court's decision in *Adams*. *Caldwell* error does indeed implicate core aspects of the sentencing procedure. As such, it implicates both the integrity of that procedure and the accuracy of the determination in any particular case. Yet to say that accuracy is implicated is not to say that the defendant is necessarily prejudiced. In fact, *Caldwell's* deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant. *Caldwell* views prosecutorial argument as a basis for reversal if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding. It is, of course, unusual to presume the existence of reversible error, on the basis of the prosecutor's comments, absent any showing of prejudice. This presumption is an important one, and, we would hope, will contribute to the increased integrity and accuracy of criminal procedure in this sensitive area. But none of this makes *Caldwell* so fundamental, or so connected with factual innocence, as to fit within *Teague's* second proviso.

VI

Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general

fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we, after a thorough review of the record, can find none.

We have covered considerable ground about the content of the *Caldwell* rule. Yet, the dissent falls silent on this set of issues, perhaps because the posture of the case does not require that we apply *Caldwell*. It is then only on narrow, but crucial grounds, that our opinion is engaged, and to assist its focus we conclude with one observation in reply to the dissenting view.

Judicial tradition demands that new rules find their trace in older ones. This search is near the core of discipline that distinguishes judges from other decision makers. Judges excel at the task. Such artisans possess a very important tool – a gauge of generality. It is no surprise then that Teague's effort to limit federal habeas by asking whether a rule is new invites those who resist the restriction to reach for their tool kit. At a sufficient level of abstraction there are no new rules. The judicial artisan can start by asserting that the old rule is that a trial must be fundamentally fair, that a defendant is entitled to procedural due process. Stated this generally there have been few if any new rules for the trial of criminal cases.

The dissent does precisely this, resting its assertions on little more than that the old rule is the prohibition of unfair jury argument. Its old law is unnarrowed by any definition of its reach and force such as whether it treats such state conduct as inherently destructive of required fairness or insists on demonstrated prejudice in a given

case. Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without *Caldwell*. Nonetheless, we are told that *Caldwell* was dictated by precedent, that it broke no new ground and that it imposed no new obligation on the states. We are asked to believe that *Caldwell* simply applied well established constitutional principles. If to the uninitiated this is dissemblance, unhappily it is to the cognoscenti business as usual. By adroit use of the generality gauge our able dissenting colleagues can breathe superficial credibility into the fable that *Caldwell* broke no new ground, imposed no new obligation on the states and was dictated by precedent. With all deference, there is afoot here no more than a resistance to the principles of finality adopted by *Teague*. We should not play such sophistical games. The issue here is whether the federal judiciary will take hold of the open ended character of the habeas remedy it has created. We are persuaded that little or nothing is left of *Teague's* promise if the dissent's view is accepted. We think that this artisan's destruction of so recent a decision by the Supreme Court should be rejected and we do so. Ultimately only *Teague's* authors can tell us if they meant what they said or if they have changed their minds.

For these reasons, we find that *Teague* bars Sawyer from pursuing his *Caldwell* claim. We affirm the district court's decision denying Sawyer's petition for a writ of habeas corpus.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON, and WILLIAMS, Circuit Judges, join dissenting:

Sawyer has been found guilty of capital murder. He does not contest his guilt. The only issue before the en banc court is whether he is entitled to have a properly instructed jury determine that he should be executed by the State or spend the rest of his life in jail, without the benefit of probation or parole.[1] Whatever we decide, he will not be set free.

The majority has rejected the interpretation of Caldwell v. Mississippi[2] on which the State relied in urging that we deny Sawyer's petition for habeas relief. The majority concludes, however, that the State may execute Sawyer, regardless of the merits of his *Caldwell* claim, because *Caldwell* established a "new rule" in constitutional law and, under the Supreme Court's recent decision in Teague v. Lane,[3] Sawyer may not receive the benefit of its application because his conviction became final before *Caldwell* was decided.

If, as the majority admits, "it is not clear how *Caldwell* . . . fits into the *Teague* scheme" because of the "newness of the amalgam" of standards *Teague* set on "uncertain precedential footing," we do not see why it is incumbent on us to condemn Sawyer to die instead of ordering the State to put the life-or-death issue to a jury that is not only not misled but is fully informed of its responsibilities. In contrast to the majority's ambivalence, we harbor no doubt that Sawyer is entitled to the

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[1] *See* La. Rev. Stat. Ann. 14:30(C) (1980).

[2] 472 U.S. 320, 105 S.Ct. 2633 (1985).

[3] ___ U.S. ___, 109 S.Ct. 1060 (1989).

constitutional protections guaranteed by the eighth amendment: *Caldwell* did not establish a "new rule," and even if it did, *Teague* requires its retroactive application. We, therefore, respectfully dissent.

I.

Although the majority opinion contains a lengthy exegesis on the role of the jury and the nature of *Caldwell* error, it does not reach the merits of Sawyer's claim. We would find that on the facts of Sawyer's case, his sentence is invalid under *Caldwell*. The prosecutor, in describing the jury's role, remarked:

> The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States,* that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation* so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I

> wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day,* is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. *All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

> It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong* so I ask that you do have the courage of your convictions (emphasis supplied).

The prosecutor's arguments in Sawyer's case fall squarely within *Caldwell's* prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility in capital sentencing. The trial court did not correct these statements, and because we cannot say that these comments had no effect on the jury's decision, we would vacate Sawyer's sentence and grant him a new sentencing hearing.[4]

II.

Whether Sawyer may receive the benefit of the constitutional protection enunciated in *Caldwell* depends, however, on the threshold determination that *Caldwell* established a "new rule." Conceding that "[i]t is . . . often difficult to determine when a case announces a new rule," the plurality in *Teague* nevertheless offered the following explanation: "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result is not *dictated* by precedent existing at the time the defendant's conviction became final."[5]

The plurality recognized that constitutional rules will fall along a "spectrum" – from those that fit neatly within the rubric of settled law to those that constitute a clear

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[4] *See Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646

[5] *Id.* at ___, 109 S.Ct. at 1070 (O'Connor, J., plurality opinion) (emphasis in original) (citations omitted).

break from prior precedent – but provided little additional guidance for determining at *which* point a rule is not "dictated" by precedent and, therefore, "new" for retroactivity purposes.[6]

In Penry v. Lynaugh,[7] however, the Court began to elaborate the meaning of the term "new rule." The Court held that although it had previously found the Texas sentencing scheme facially valid,[8] the scheme, as applied to Penry, unconstitutionally limited the jury's ability to consider certain, relevant mitigating evidence.[9] The Court held that this determination did not constitute a "new rule" given the requirement that capital sentencing procedures permit the sentencing jury to consider and give effect to all relevant mitigating evidence.[10]

The Court reasoned that a rule is not "new" for purposes of retroactivity analysis when it "fulfill[s] the assurance" upon which a previous case "was based," or merely "interpret[s] broadly" that previous case.[11] The Court thus made clear that its "*dictated* by precedent" language was not intended to categorize as "new" every rule that does not fit precisely within the pattern of a previously decided case. Rather, the Court recognized

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[6] *See ibid.*

[7] ___ U.S. ___, ___ S.Ct. ___, 57 U.S.L.W. 4958 (June 26, 1989).

[8] *See* Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2951 (1976).

[9] *Penry*, 57 U.S.L.W. at 4965.

[10] *Id.* at 4961-62; *see* Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982).

[11] *Penry*, 57 U.S.L.W. at 4961.

that the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts. Rules that are the product of this gradual process of refining and developing doctrine are not "new." To define "new" rules more broadly would depart significantly from the traditional understanding of constitutional jurisprudence as an evolving body of principles rather than jarring series of revolutionary pronouncements.[12]

This differentiation between elaborating and applying established principles, on the one hand, and announcing new rules that are dissonant with prior understandings of the law, on the other hand, derives directly from Justice Harlan's view of retroactivity that the Court adopted in *Teague* and applied in *Penry*. Justice Harlan observed "that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles . . . whose meanings are altered slowly and subtly as generation succeeds generation."[13] He reasoned that such rules are not "new" and should be

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[12] *See* Yates v. Aiken, 484 U.S. ___, ___, 108 S.Ct. 534, 538 (1988); Truesdale v. Aiken, ___ U.S. ___, 107 S.Ct. 1394 (1987); Griffith v. Kentucky, U.S. ___, ___, 107 S.Ct. 708, 714 (1987); Allen v. Hardy, ___ U.S. ___, ___, 106 S.Ct. 2878, 2880 (1986); Shea v. Louisiana, 470 U.S. 51, 57, 105 S.Ct. 1065, 1068 (1985); United States v. Johnson, 457 U.S. 537, 549-50, 102 S.Ct. 2578, 2586-87 (1982); Solem v. Stumes, 465 U.S. 638, 662, 104 S.Ct. 1338, 1352 (1984) (Stevens, J., dissenting); *see also* Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U.Chi.L.R. 719, 749-54 (1966).

[13] Desist v. United States, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041 (1969) (Harlan, J., dissenting).

given retroactive application in habeas proceedings because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final."[14]

Caldwell held that a prosecutor may not "le[a]d" a jury to "believe" that it is not "responsib[le] for determining the appropriateness of [a] defendant's death."[15] The Court based this rule upon its belief that such prosecutorial misconduct "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability' " in capital sentencing, and that such conduct, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment."[16] Arguments that seek to diminish the jury's sense of responsibility, the Court explained, undermine core eighth amendment values:

> The "delegation" of sentencing responsibility that the prosecutor here encouraged . . . would deprive [the defendant] of . . . [the] right to a fair determination of the appropriateness of his death . . . , for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination,

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[14] *Id.* at 264, 89 S.Ct. at 1041.

[15] *Caldwell*, 472 U.S. at 329, 105 S.Ct. at 2639.

[16] *Id.* at 340, 105 S.Ct. at 2645 (footnote omitted) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1978) (Stewart, J., plurality opinion)); *see* Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974).

> few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "(those) compassionate or mitigating factors stemming from the diverse frailties of humankind."[17]

Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence. The *Caldwell* Court fulfilled the assurance enunciated in Furman v. Georgia[18] and Gregg v. Georgia[19] that capital punishment not be administered "wantonly" or "freakishly" or in an "arbitrary and capricious manner;"[20] it applied the "need for reliability in the determination that death is the appropriate punishment in a specific case," assured in Woodson v. North Carolina,[21] Lockett v. Ohio,[22] and Eddings v. Oklahoma,[23] to a situation in which that

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[17] *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640 (quoting *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

[18] 408 U.S. 238, 92 S.Ct. 2726 (1972).

[19] 428 U.S. 262, 96 S.Ct. 2950 (1976).

[20] *Gregg*, 428 U.S. at 188, 96 S.Ct. at 2932 (Stewart, J., plurality opinion) (citing *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763 (Stewart, J., concurring)).

[21] 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1978) (Stewart, J., plurality opinion);

[22] 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978) (Burger, C.J., plurality opinion).

[23] 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77 (1982).

reliability was compromised; it fulfilled the promise of *Woodson*, *Lockett*, and *Eddings* that a defendant be sentenced to death only after an individualized determination of his moral culpability;[24] and it applied the need first articulated in McGautha v. California[25] that jurors be "confronted with the truly awesome responsibility of decreeing death for a fellow human"[26] to a case in which the prosecutor specifically instructed the jury that it had no such responsibility. With due respect to the three dissenters in *Caldwell*, it is difficult to imagine the Court reaching any other conclusion given these precedents.

There was, moreover, no precedent inconsistent or dissonant with *Caldwell* at the time it was decided. While the Court, in Donnelly v. DeChristoforo,[27] had imposed a more stringent due-process test for claims of improper argument made at the guilt/innocence phase of trial, this analysis applied neither to improper argument at sentencing proceedings nor to argument implicating "specific guarantees of the Bill of Rights."[28] The *Donnelly* Court thus left open the possibility that improper arguments at sentencing not violative of the Due Process Clause may

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[24] *See Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion); *Lockett*, 438 U.S. at 601-05, 98 S.Ct. at 2963-65 (Burger, C.J., plurality opinion); *Eddings*, 455 U.S. at 112-15, 102 S.Ct. at 875-77; *see also* Stanford v. Kentucky, ___ U.S. ___, ___ S.Ct. ___ (1989) (O'Connor, J., concurring); South Carolina v. Gathers, ___ U.S. ___, ___ S.Ct. ___ (1989).

[25] 402 U.S. 183, 91 S.Ct. 1454 (1971).

[26] *Id.* at 208, 91 S.Ct. at 1467.

[27] 416 U.S. 637, 94 S.Ct. 1868 (1974).

[28] *Id.* at 643, 94 S.Ct. at 1871.

be held to contravene the eighth amendment's requirements.

Similarly, in California v. Ramos,[29] the Court posited its approval of jury instructions containing information regarding postconviction procedures on the fact that the information was both relevant and accurate.[30] While the Court in *Ramos* did not address whether a prosecutor violates the Constitution by presenting irrelevant and misleading information concerning post-conviction proceedings, its emphasis on the nature of the instruction forecast that such information would be found to undermine the reliability of the sentencing process by injecting into it an arbitrary factor in violation of the eighth amendment.[31]

If, as the Court in *Penry* instructed, we should consider a case "dictated by precedent" and not "new" for retroactivity purposes when it "fulfill[s] the assurance[s]" of or "interpret[s] broadly" principles articulated in a previous case,[32] it is difficult to see how the majority may conclude that *Caldwell* announced a "new rule." *Caldwell* fulfilled the assurance of and interpreted faithfully the settled principle in eighth amendment jurisprudence that a verdict of death must rest upon the reliable determination of a jury accurately informed of its "awesome

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[29] 463 U.S. 992, 103 S.Ct. 3446 (1983).

[30] *Id.* at 1004, 1009, 1012, 103 S.Ct. at 3455, 3457, 3459.

[31] *See Caldwell*, 472 U.S. at 342-43, 105 S.Ct. at 2646-47 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Ramos*, 463 U.S. at 999, 1010, 103 S.Ct. at 3451, 3458).

[32] *Penry*, 57 U.S.L.W. at 4961.

responsibility;" the same line of eighth amendment cases that compelled the result in *Penry* thus compelled the result in *Caldwell*.

The majority contends that the foregoing analysis unduly restricts the scope of *Teague*. Its criticism of our interpretive method is misdirected, however, for the majority's dispute is not, in reality, with *our* interpretation of *Teague*, but with *Penry's* elaboration of the "new rule" standard set forth in *Teague*. Indeed, the majority's criticism of our analysis echoes precisely Justice Scalia's dissent in *Penry*.[33] In admonishing us to wait for "*Teague's* authors [to] . . . tell us if they meant what they said," the majority ignores the fact that *Teague's* authors have already spoken in *Penry* and have effectively rejected any definition of a "new rule" that would sweep broadly enough to encompass *Caldwell*.

If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than Penry's, for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*. Indeed, the Court in *Caldwell* observed that after *Furman*, several state supreme courts – including Louisiana's – had anticipated *Caldwell* and found that *Caldwell*-type errors undermined the validity of a death sentence;[34] it

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[33] *Id.* at 4971.

[34] *Caldwell*, 472 U.S. at 333-34 & n. 4, 105 S.Ct. at 2642 & n. 4 (citing cases).

noted that some state courts had prohibited such arguments in both capital and noncapital cases even before *Furman*.[35]

At least five years before the Supreme Court decided *Caldwell*, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor into the jury's decision and invalidated the sentence. In 1980, when denying an application for rehearing in State v. Berry,[36] the Louisiana Supreme Court recognized

> [a]ny prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, . . . then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated. . . . The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.[37]

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[35] *Id.* at 334 & n. 5, 105 S.Ct. at 2642 & n. 5 (citing cases).

[36] 391 So.2d 406 (La. 1980) (denial of application for rehearing), *cert. denied*, 451 U.S. 1010 (1981).

[37] *Berry*, 391 So.2d at 418 (emphasis in original) (portions of text omitted); *see id.* at 419-21 (Calogero, J., dissenting from denial of rehearing); State ex rel. Williams v. Blackburn, 396 So.2d 1249, 1250 (La. 1981) (Dennis, J., dissenting from denial of stay); *id.* at 1250 (Calogero, J., concurring in denial of the stay); State v. Monroe, 397 So.2d 1258, 1270 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983).

In 1982, in State v. Willie,[38] the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing when the prosecutor referred to appellate review and told the jury that "the buck really don't [sic] stop with you. The buck starts with you. . . . [W]hat I'm asking you to do is start the buck rolling."[39] The court quoted *Berry*, and added:

> This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence of death is appropriate is not entirely the jury's responsibility.[40]

In State v. Robinson,[41] also in 1982, the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing because the prosecutor referred repeatedly to the jury's sentence as a "recommendation" that did not have a "strong possibility" of "get[ting] through all of that [appellate] review."[42] Citing *Berry* and *Willie*, the court anticipated the "no effect" test required by the eighth amendment, stating:

> The closing argument requires that the death sentence be set aside, because this court cannot determine that misleading and improper remarks of this magnitude did not influence the jury's recommendation. . . . [W]e cannot say that the jury's sentencing discretion was unaffected by the prosecutor's repeated and often misleading references to the largely irrelevant consideration of appellate review of death sentences.[43]

As the Louisiana Supreme Court observed, *Caldwell* neither imposed a new obligation on prosecutors or courts nor broke new ground in Louisiana.[44] Before the Supreme Court decided *Caldwell*, Louisiana had already prohibited *Caldwell* argument and required reversal of sentences when it found such error. Moreover, in finding that *Caldwell* argument injected an arbitrary factor into the sentencing process, the Louisiana courts relied on the same eighth amendment principles that compelled the Supreme Court's decision in *Caldwell*. In State v. Sonnier,[45] the Louisiana Supreme Court stated that under Louisiana law, the court "is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion,

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[38] 410 So.2d 1019 (La. 1982), *cert. denied*, 465 U.S. 1051 (1984).

[39] *Id.* at 1034.

[40] *Id.* at 1035; *see* State v. Clark, 492 So.2d 862, 870-71 (La. 1986).

[41] 421 So.2d 229 (La. 1982).

[42] *Id.* at 231-33.

[43] *Id.* at 233-34 (portions of text omitted).

[44] *See* State ex rel. Busby v. Butler, 538 So.2d 164, 173 (La. 1988).

[45] 379 So.2d 1336 (La. 1979).

prejudice or any arbitrary factor."[46] The court described how Louisiana modelled its provision for independent appellate review of death sentences on the Georgia procedure sanctioned in Gregg v. Georgia, and cited approvingly the Georgia Supreme Court's reversal of a death sentence when it found that "an unobjected to argument by a [prosecutor] may have influenced the jury to impose a more severe sentence than unbiased judgment would have given."[47] In *Willie*, the court again adverted to *Gregg*'s requirement that a sentencer's discretion be channelled to avoid arbitrary and capricious imposition of the death penalty, and held that the prosecutor's improper argument regarding appellate review "lessened" the jurors' appreciation of their "awesome responsibility" and "created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors."[48] Echoing *McGautha*, the Louisiana Supreme Court thus anticipated almost exactly Justice O'Connor's conclusion in *Caldwell* that such arguments "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' . . . or through 'whim . . . or mistake.' "[49]

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[46] *Id.* at 1371.

[47] *Id.* at 1370-71 & n.4.

[48] *Willie*, 410 So.2d at 1032, 1034.

[49] *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451, and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

The majority concedes that numerous states, including Louisiana, forecast *Caldwell* by prohibiting the arguments that the *Caldwell* Court ultimately barred, but concludes that because states' *Caldwell* precursors did not impose an independent constitutional constraint on state power, they are irrelevant to *Teague*'s analysis. That the state courts adopted these rules before *Caldwell* to conform state law to perceived eighth amendment requirements, rather than conforming to an independent federal constitutional constraint articulated by the Supreme Court, is a distinction without a difference for the purpose of determining whether *Caldwell* announced a "new rule." In either case, the state courts based their interpretations on the eighth amendment, and their widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

In Dugger v. Adams,[50] the Supreme Court found these state laws sufficiently established to conclude that the legal basis for raising a *Caldwell*-type claim prior to *Caldwell* was "reasonably available to counsel," and that *Caldwell* was, therefore, of such vintage as to be subject to the procedural-bar rule.[51] In Moore v. Blackburn,[52] we considered a writ application based on *Caldwell* barred by the abuse-of-writ doctrine for the same reason. If both the Supreme Court and this court have considered, on the

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[50] ___ U.S. ___, 109 S.Ct. 1211 (1989).

[51] *Id.* at ___, 109 S.Ct. at 1215-17.

[52] 774 F.2d 97 (5th Cir. 1985), *cert. denied*, 476 U.S. 1176 (1986).

basis of state laws anticipating *Caldwell*, a *Caldwell*-type claim sufficiently established to negate cause for failing to raise it years before *Caldwell*, how may we now ignore these state laws and conclude that *Caldwell* is novel?

Contrary to the majority's assertion, the *Teague* plurality's citation of *Ford v. Wainwright*[53] as an example of a "new rule" does not establish that state rules are irrelevant to determining whether a rule is "new."[54] In *Ford*, the Court looked to state law for "objective evidence of contemporary values"[55] and noted that 26 states had enacted statutes prohibiting the execution of insane persons while other states adhered to the common law principle prohibiting such executions.[56] Although the *Teague* plurality did not explain *why Ford* should be considered a "new rule," the Court's discussion in *Penry* suggests that any substantive eighth amendment rule that "prohibits imposing the death penalty on a certain class of defendants because of their status or because of the nature of their offense" will be "new" because of its sweeping and categorical nature,[57] even though such a rule may be premised on a finding that contemporary values, manifested through legislative enactments, already condemn

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[53] 477 U.S. 399, 106 S.Ct. 2595 (1986).

[54] *See Teague*, ___ U.S. at ___, 109 S.Ct. at 1070.

[55] *Ford*, 477 U.S. at 406, 106 S.Ct. at 2600.

[56] *Id.* at 408-09 & n.2, 106 S.Ct. at 2601 & n.2.

[57] *Penry*, 57 U.S.L.W. at 4965 (citations omitted). Such a rule would, however, necessarily fall within the first exception to *Teague* and would be applied retroactively. *See ibid.*

such punishment.[58] The fact that a rule is inherently ground-breaking insofar as it announces a new, categorical rule of substantive eighth amendment law thus appears to outweigh the fact that the rule derives from these indicia of community consensus.

The *Teague* plurality's citation of *Ford* cannot, therefore, be construed as a broad holding regarding the proper role of state law in determining whether a rule is "new." At most, *Teague*'s citation of *Ford* indicates that the existence of state common law and statutes embodying principles later incorporated into eighth amendment law does not preclude a finding that the rule is nevertheless "new." It does not command us to ignore state law and, in particular, it does not indicate that state court interpretations of the federal Constitution are irrelevant to determining whether a rule is "new" under *Teague*.

Indeed, the majority's refusal to address the import of a state's interpretation of the federal Constitution misconstrues the basis of *Teague*'s retroactivity principles. The plurality opinion in *Teague* anchored its retroactivity analysis, the majority recognizes, in the principles of federalism and finality; it sought to mitigate the uncertain effect of new and unanticipated obligations on final state court judgments.[59] The majority ignores, however, a

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[58] *Ibid.*; *see Stanford v. Kentucky*, ___ U.S. ___, ___ S.Ct. ___, 57 U.S.L.W. 4973, 4976 (1989); *Thompson v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2687, 2691 (1988); *Enmund v. Florida*, 458 U.S. 782, 788-96, 102 S.Ct. 3368, 3371-76 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97, 97 S.Ct. 2861, 2866-68 (1977).

[59] *Teague*, ___ U.S. at ___, 109 S.Ct. at 1070-75 (O'Connor J., plurality opinion).

basic precept of federalism that animated the *Teague* plurality: state courts, no less than federal courts, may meaningfully interpret the federal Constitution. "It is intolerable," Justice Harlan asserted, "that [the Supreme Court] take to [itself] the sole ability to speak to . . . issues of federal constitutional law;" the decision of an "inferior" court, "cognizant of the Federal Constitution and duty bound to apply it," should not be deemed "forever erroneous because years later th[e Supreme] Court took a different view of the relevant constitutional command."[60] The majority's failure to acknowledge and give effect to Louisiana's prohibition of *Caldwell*-type error prior to *Caldwell* minimizes the role of state courts in our federal constitutional framework and devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms.[61]

Sawyer did not raise his *Caldwell* claim on direct review, and, on collateral review, the Louisiana courts summarily rejected the argument on its merits. Although our conclusion on the merits of Sawyer's claim differs from that reached by the Louisiana courts on collateral review, we rely on the same constitutional principles that the state courts considered, not on some "new" constitutional rule unanticipated by the Louisiana Supreme Court. An advocate of even the narrowest view of the appropriate role of collateral review could not maintain

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[60] Mackey v. United States, 401 U.S. 667, 680, 689-90, 91 S.Ct. 1160, 1174, 1178 (1971) (Harlan, J., concurring in the judgment).

[61] *See* Cover and Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977).

that principles of federalism and finality preclude habeas relief whenever a federal court, applying the same constitutional principles as the state court, reaches a different conclusion on the merits of a petitioner's claim. This minimal "backstop" function of collateral review to which the majority refers remained untouched by *Teague*.

We are aware that the Court's decision in *Penry* implies that the "new rule" analysis is properly focused on one state when the proposed rule is directed at the procedure of a particular state, but may be broader when the proposed rule would apply to all states.[62] We, therefore, do not suggest that Louisiana's anticipation of *Caldwell* is dispositive[63] of whether *Caldwell* was a new rule, for *Caldwell* error is not restricted to Louisiana's sentencing procedure. At a minimum, however, the adoption of *Caldwell*-type rules by numerous states, including Louisiana, prior to *Caldwell* reveals the degree to which the Court's eighth amendment jurisprudence compelled the result reached in *Caldwell*.

III.

Even if *Caldwell* announced a new rule, it nevertheless should be applied to cases on collateral review because it falls within the exception provided by *Teague* for new rules requiring the observance of "those procedures that . . . 'are implicit in the concept of ordered liberty,' " that "implicate the fundamental fairness of the

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[62] *See Penry*, 57 U.S.L.W. at 4961-62, 4965.

[63] *See Teague*, 109 S.Ct. at 1070 (citing Ford, 477 U.S. at 410).

trial," and "without which the likelihood of an accurate conviction is seriously diminished."[64]

The plurality in *Teague* diverged from Justice Harlan's approach to retroactivity by adding an "accuracy" qualification to the "fundamental fairness" exception, implying that only those rules touching on factual innocence would fall within it.[65] While Justice Harlan had subscribed to this view in his dissent in *Desist*,[66] he subsequently rejected it in *Mackey*, acknowledging that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."[67] The majority admits that the *Teague* plurality's modification of Justice Harlan's second exception does not command a majority of the Court, and although a solid majority of the Court employed *Teague*'s retroactivity analysis in *Penry*, *Penry* did not address the *Teague* plurality's gloss of the fundamental fairness exception.[68]

The Court's unanimous recognition in *Penry* that *Teague's* first exception encompasses a distinct eighth

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[64] *Teague*, ___ U.S. at ___, 109 S.Ct. at 1075-77 (O'Connor, J., plurality opinion) (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (Harlan, J., concurring in the judgment) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937))).

[65] *See Teague*, ___ U.S. at ___, 109 S.Ct. at 1080 (Stevens, J., concurring in part and concurring in the judgment).

[66] *See Desist*, 394 U.S. at 262, 89 S.Ct. at 1041 (Harlan, J., dissenting).

[67] *Mackey*, 401 U.S. at 694, 91 S.Ct. at 1181 (Harlan, J., concurring in the judgment).

[68] *See Penry*, 57 U.S.L.W. at 4961, 4965.

amendment component[69] suggests that the Court would find a parallel component in *Teague's* second exception, and exempt from *Teague's* nonretroactivity rule those capital sentencing procedures that ensure the "accuracy" of the sentencer's determination. The plurality in *Teague* acknowledged that "'a' criminal judgment necessarily includes the sentence imposed."[70] Both the plurality and dissent in *Teague* would, therefore, agree that *Teague's* exemption of new rules that ensure the accuracy of the determination of the defendant's guilt or innocence includes new rules that ensure the accuracy of the sentencer's determination that a particular defendant deserves the death penalty.[71]

The rule *Caldwell* announced, based on the "heightened 'need for reliability' " in capital sentencing,[72] satisfies *Teague's* second exception: *Caldwell* error undermines the eighth amendment's requirement that responsible jurors produce individualized, reliable verdicts, and thus seriously diminishes the likelihood of an accurate sentence. As Justice O'Connor emphasized in her concurrence in *Caldwell*: "[T]he prosecutor's misleading emphasis on appellate review misinformed the jury, . . .

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[69] *Ibid.*

[70] *Teague*, ___ U.S. at ___ n. 3, 109 S.Ct. at 1077 n. 3 (O'Connor, J., plurality opinion).

[71] *See ibid; id.* at ___ n. 5, 109 S.Ct. at 1089 n. 5 (Brennan, J., dissenting); *cf. Adams*, ___ U.S. at ___, 109 S.Ct. at 1217-18 n. 6; *id.* at ___ n. 4, 109 S.Ct. at 1219 n. 4 (Blackmun, J., dissenting); *Ramos*, 463 U.S. at 1007-09, 103 S.Ct. at 3457.

[72] *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645 (quoting *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily and capriciously' . . . or through 'whim or mistake.' "[73] For the majority to ignore the effect of *Caldwell* error on the reliability and accuracy of the sentence seriously misapprehends the nature of a *Caldwell* violation and the reasons behind the Court's decision to prohibit it.

To justify its conclusion that *Caldwell* does not satisfy *Teague's* second exception, the majority relies primarily on Dugger v. Adams,[74] in which the Court held that refusing to consider a petitioner's procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice."[75] Acknowledging that *Adams* scrutinized "the facts of a particular case, while the *Teague*[-]ordered liberty standard looks to the character of the general rule asserted," the majority nonetheless dismisses this distinction as more semantic than substantive.

Whether or not the principles underlying the procedural default and retroactivity doctrines are similar, there is a substantial difference between denying *a particular petitioner* the benefit of a rule based on the unique facts of his case, and holding that *no petitioner*, whatever his situation, may benefit from retroactive application of the rule to his case. The Court recognized this distinction in *Adams*, stating that "[d]emonstrating that an error is by

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[73] *Caldwell*, 472 U.S. at 343, 109 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451 and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

[74] ___ U.S. ___, 109 S.Ct. 1211 (1989).

[75] *Id.* at ___ n. 6, 109 S.Ct. at 1217-18 n.6.

its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent, of the sentence he or she received."[76] Under *Teague*, we must address the nature of *Caldwell* error, not the specific facts of Sawyer's case.

The majority conflates the individual and the categorical in order to obscure the ultimate import of its holding – that the eighth amendment values *Caldwell* articulated constitute an unwarranted innovation in eighth amendment jurisprudence and are insignificant in the pantheon of values present in criminal procedure. *Caldwell* is worthy of higher esteem, for the Supreme Court found *Caldwell* error so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state demonstrated otherwise.[77] Not all errors in the capital sentencing context are so critical. For example, a death sentence based on an aggravating factor invalid under state law, but supported by evidence properly before the sentencer, does not sufficiently implicate the accuracy of the sentencing process to warrant a presumption of prejudice.[78] Prejudice is assumed, however, when the sentencer has not been allowed to consider or give effect to relevant

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[76] *Ibid.*

[77] *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

[78] *See* Barclay v. Florida, 463 U.S. 939, 956-57, 103 S.Ct. 3418, 3428 (1983); Zant v. Stephens, 462 U.S. 862, 887-88, 103 S.Ct. 2733, 2748 (1983).

mitigating evidence,[79] when an aggravating factor is premised on incorrect or invalid evidence,[80] or when the jury's sense of responsibility has been undermined.[81]

IV.

The majority acknowledges that the death penalty "is different from all other [punishments] in many respects." Yet, by denying that *Caldwell* interpreted and applied consistently the Court's eighth amendment jurisprudence to new facts, and by refusing to accord the heightened need for reliability in capital sentencing a role in *Teague's* fundamental fairness exception, the majority eviscerates the procedural protections on which the constitutionality of this ultimate and irreversible penalty is premised. The majority has, in effect, given finality concerns greatest force in the area where the eighth amendment requires that we be most wary. We cannot agree that a state's interest in the finality of a judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, execution of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

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[79] *See* Hitchcock v. Dugger, __ U.S. __, __, 107 S.Ct. 1821, 1824 (1987); Skipper v. South Carolina, 476 U.S. __, __, 106 S.Ct. 1669, 1673 (1986).

[80] *See* Johnson v. Mississippi, 486 U.S. __, __, 108 S.Ct. 1981, 1987 (1988).

[81] *See* Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646.

It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule,[82] to prevent us from applying *Caldwell*, which is at most an extension of settled doctrine. If any case should be considered as having established a new rule not retroactively applicable to habeas petitioners whose convictions have become final, it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme Court 16 months after submission of Sawyer's case and 8 ½ years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.

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[82] *See Teague*, __ U.S. at __ nn. 3 & 4, 109 S.Ct. at 1086 nn. 3 & 4 (Brennan, J., dissenting); *compare id.* at __, 109 S.Ct. at 1060-78 (O'Connor, J., plurality opinion) *with* Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967); *Desist*, 394 U.S. 244, 89 S.Ct. 1030 (1969); *Mackey*, 401 U.S. 667, 91 S.Ct. 1160

Robert Wayne SAWYER

v.

John WHITLEY, Warden, Louisiana State Penitentiary, Angola, Louisiana.

Civ. A. No. 90-4035.

United States District Court, E.D. Louisiana.

July 16, 1991.

Louisiana prisoner filed a second petition for a writ of habeas corpus after he was convicted of first-degree murder and sentenced to death, the Louisiana Supreme Court, 422 So.2d 95, affirmed, the United States Supreme Court, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407, granted certiorari and vacated and remanded, and the Louisiana Supreme Court, 442 So.2d 1136, again affirmed. The District Court, Mentz, J., held that: (1) the prisoner failed to show that the ends of justice would be served by reaching the merits of successive claims that had been raised in the prisoner's first habeas petition; (2) some claims that had been omitted from the earlier petition were barred under the abuse of the writ doctrine; (3) the prisoner's claim that design defects in Louisiana's electric chair would result in cruel and unusual punishment was not an abuse of the writ, because the claim was based on evidence that had not been available at the time of the first habeas petition; and (4) electrocutions in Louisiana's electric chair do not result in cruel and unusual punishment, although the design of the chair could have been improved.

Petition for writ of habeas corpus denied.

Nicholas J. Trenticosta, New Orleans, La., for petitioner.

Dorothy A. Pendergast, Asst. Dist. Atty., Research & Appeals, Gretna, La., Annette Viator, Chief Legal Counsel, Dept. of Corrections, Baton Rouge, La., for respondent.

MEMORANDUM OPINION

MENTZ, District Judge.

This death penalty case is before the Court for review of Robert Sawyer's second petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the interest that the validity of his conviction be finally resolved, the Court permitted Sawyer to amend this second petition three times. The State filed responses to the petition and each amendment. After careful review of the briefs and evidence submitted by the parties, the record, and the applicable law, the Court denies Sawyer's petition for writ of habeas corpus.

I.

Robert Sawyer is a state prisoner incarcerated at the Louisiana State Penitentiary for the murder of Frances Arwood. Although the gruesome details of the murder of [sic] have been recounted several times[1], the Court does so again for a proper understanding of the ruling herein.

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[1] *See Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2825, 111 L.Ed.2d 193 (1990); *Sawyer v. Butler*, 848 F.2d 582, 585 (5th Cir.1988); *Sawyer v. State*, 442 So.2d 1136, 1136-37 (La.1983); *State v. Sawyer*, 422 So.2d 95, 97-98 (La.1982).

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant [Robert Sawyer] was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the

attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant)

would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("they've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw the defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-97 (Footnotes omitted).

II.

Sawyer was convicted of first degree murder and sentenced to death on September 19, 1980.[2] He has pursued post-conviction remedies for more than a decade. At all stages, he was represented by counsel.

The Louisiana Supreme Court affirmed his conviction and sentence on direct appeal. *State v. Sawyer*, 422 So.2d 95 (La. 1982). The United States Supreme Court vacated and remanded the case to the Louisiana Supreme Court for consideration of an issue unrelated to the present petition.[3] *Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the court again affirmed the conviction and sentence. *State v. Sawyer*, 442 So.2d 1136 (La.1983). Thereafter, Sawyer filed a state application for habeas corpus relief. After an evidentiary hearing, the state trial court denied relief. Next, Sawyer sought a writ of habeas of corpus in the Louisiana Supreme Court, which summarily denied his application. *Sawyer v. Maggio*, 479 So.2d 360 (La.1985).

Sawyer filed his first petition for federal habeas corpus relief in this court on January 20, 1986. Sawyer's petition raised 18 claims for relief, all of which the Court addressed on the merits and denied. On appeal, the Fifth

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[2] Sawyer and Lane were tried separately. Lane also was convicted of first degree murder, but he received a life sentence without benefit of parole, probation, or suspension of sentence. *See State v. Lane*, 414 So.2d 1223 (La.1982) (affirming Lane's conviction).

[3] The United States Supreme Court remanded for consideration of whether the invalidity of an aggravating circumstance in sentencing impaired the death sentence.

Circuit affirmed the denial. *Sawyer v. Butler,* 848 F.2d 582 (5th Cir.1988).[4] On rehearing *en banc,* the Fifth Circuit affirmed the panel's opinion. *Sawyer v. Butler,* 881 F.2d 1273 (5th Cir. 1989). On June 21, 1990, the United States Supreme Court affirmed the judgment of the Fifth Circuit. *Sawyer v. Smith,* ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).[5]

Sawyer filed his second state petition for habeas corpus relief on October 3, 1990. On October 5, 1990, the trial court summarily denied Sawyer's application as repetitive and without merit. The Louisiana Supreme Court denied Sawyer's supervisory writ without opinion on October 7th, 1990. On October 8, 1990, Sawyer filed his

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[4] On appeal, Sawyer raised only three challenges to his confinement and sentence: 1) whether he was denied effective assistance of counsel; 2) whether he was denied due process because the trial court failed to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar at least five years; and 3) whether prosecutorial misconduct erroneously misled the jury as to their role in the death penalty determination. In addition, Sawyer challenged the district court's application of a prejudice requirement on the claim of prosecutorial misconduct.

[5] The Supreme Court considered only the question of whether a prisoner whose murder conviction became final before the decision in *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which prohibits the imposition of death sentence where the prosecutor's closing arguments diminished the jury's sense of responsibility for imposing a capital sentence, is entitled to use that decision to challenge his capital sentence in a federal habeas corpus action. The Court ruled that he cannot not [sic], because *Caldwell* announced a new rule and did not come within the exception for rules necessary for fundamental fairness of the criminal proceeding.

second petition for federal habeas corpus relief in this Court.[6] In this second petition, the present petition before the Court, Sawyer raises six grounds for relief, described in his petition as follows:

> 1) Mr. Sawyer was denied due process and a meaningful and individualized sentencing determination because of trial counsel's unreasonable failure to investigate and present compelling and readily available mitigating evidence and to obtain defense mental health experts in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
>
> * * *
>
> 2) Mr. Sawyer was incompetent to proceed to trial, and while the issue of competency was raised, it was not adequately resolved because the sanity commission members rendered an incompetent evaluation in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
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> * * *

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[6] At that time, Sawyer's execution was scheduled for October 10, 1990. On October 9, 1990, the Governor of Louisiana, Governor Roemer, granted a reprieve and stay of execution for thirty days so that the Pardon Board could fully review the case. On November 13, 1990, Judge Joseph Tiemann, District Judge of the Twenty-Fourth Judicial District Court issued a warrant for Sawyer's execution to be carried out on December 14, 1990. On December 12, 1990, this Court stayed the execution to conduct an evidentiary hearing on Sawyer's claim that Louisiana's electric chair is defectively designed.

3) Mr. Sawyer will remain conscious during his execution by electrocution and will be unnecessarily tortured; his execution will not comport with this society's evolving standards of decency and will violate the Eight and Fourteenth Amendments to the United States Constitution.

* * *

4) Louisiana's electric chair is riddled with design defects which cause excessive burning, mutilation, and pose a future risk of even greater torture in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article 1, section 20 of the Louisiana Constitution.[7]

* * *

5) The Eighth Amendment to the United States Constitution forbids the State from carrying out the imposition of the death penalty to Mr. Sawyer [sic] by electrocution.

* * *

6) The State hid exculpatory evidence, failed to reveal that its star witness had been promised immunity in exchange for her testimony, and knowingly offered false testimony at trial in violation of Mr. Sawyer's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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[7] Federal habeas corpus relief can be granted only for violations of the Constitution or laws of the United States. *See Wills v. Egeler*, 532 F.2d 1058 (6th Cir.1976). For that reason, the alleged violation of Louisiana's constitution is not discussed herein.

III.

As this is Sawyer's second federal habeas petition, the Court must first consider whether his claims are barred pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases. Rule 9(b) provides:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C. § 2254 Rule 9(b) (West 1991).

A. Successive Claims

A claim in a second federal habeas corpus action may be barred as a successive claim "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders v. United States*, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963). Once it is shown that the claims raised in the new petition were determined against the petitioner on the merits on the prior petition, the petitioner has the burden to show that "the ends of justice would be served by a redetermination of the ground." *Id.* 373 U.S. at 16, 83 S.Ct. at 1078. In *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), the

Supreme Court undertook to provide the lower courts with a definition of "the ends of justice". The Court held that "the 'ends of justice' require federal courts to entertain [a successive] petition only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.* 477 U.S. at 454, 106 S.Ct. at 2627.

In the case at bar, three of the six grounds for relief contained in Sawyer's present petition, Claims 1, 3, and 5, were determined against him on the merits on his first petition. Thus, Sawyer has the burden to show that the ends of justice would be served by reaching the merits of these successive claims.

Claim 1: Ineffective Assistance of Counsel Due to Failure to Present Mitigating Evidence at the Sentencing Phase

Sawyer alleges in Claim 1 that he was denied a proper sentencing determination because his trial counsel failed to obtain mental health experts and present at the sentencing phase evidence in mitigation of the death penalty. Sawyer does not dispute that he specifically raised this same ground for relief in his first federal habeas petition, Claim III, Fact 8, and that it was rejected on its merits. The only difference is that now Sawyer has come forward with additional evidence to support this claim.

The evidence in support of Claim 1 shows Sawyer's organic brain damage, moderate mental retardation, and various other mental disorders, as well as his history of childhood abuse, neglect, and tragedy. In addition, there is evidence that Sawyer was hospitalized in four mental health facilities, that he received shock therapy, and that

in 1967, he was adjudicated incompetent by the State of Tennessee.

Sawyer's trial counsel submitted similar evidence at the sentencing phase. The jury heard extensive testimony from Sawyer's sister and brother-in-law about Sawyer's mother's suicide, his mental instability, his abusive and neglectful father, and his commitment to a mental hospital and shock therapy.

Sawyer contends that if the additional evidence now offered had been introduced at the sentencing phase, it would have reduced his moral culpability, and the jury would have rejected the death penalty for a life sentence. Sawyer does not allege that any of this additional evidence demonstrates his factual innocence. For this reason, he cannot carry his burden of proof to show that the ends of justice would be served by reaching the merits of this issue again. Therefore, Claim 1 of Sawyer's petition is barred under Rule 9(b) as a successive claim.

Claims 3 and 5: Execution by Electrocution

Claim 3 alleges that Sawyer will remain conscious during the electrocution and will be unnecessarily tortured. Claim 5 alleges that execution by electrocution is cruel and unusual punishment. Sawyer previously raised these same grounds for relief in his first federal habeas petition, at Claim XV:

> Electrocution involves physical torture and is an excessively cruel and unnecessary method of extinguishing human life. Electrocution requires massive doses of electricity to the condemned person for several minute [sic] before death. The condemned person does not become

> unconscious until after the person has endured a period of agonizing pain. Electrocution disfigures and physically distorts the condemned person.

As these grounds were determined to be without merit on Sawyer's first petition,[8] Sawyer must make a colorable showing of factual innocence to avoid the bar.

In support of Claims 3 and 5, Sawyer submitted an affidavit from Dr. Harold Hillman, Director of the Unity Laboratory in Applied Neurology at the University of Surrey, England, who opines that electrocution is intensely painful. Sawyer also cites various cases and macabre newspaper accounts of electrocution, as well as professional treatises on the subject of electrocution. In addition, Sawyer submitted a post-execution photograph of Robert Wayne Williams. The 1983 photograph shows burns on Williams' head and leg. This evidence relates only to Sawyer's death penalty, and has no bearing on his factual guilt or innocence. Therefore, the Court finds that the ends of justice would not be served by a redetermination of this issue, and Claims 3 and 5 are barred under Rule 9(b) as successive claims.

B. Abuse of the Writ

When a claim is raised for the first time in a second federal habeas petition, the Court must examine the

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[8] The district court ruled that the grounds for relief raised on Claim XV were conclusory in nature, and that Sawyer offered no fact or law to justify their consideration. This was a determination on the merits, which Sawyer did not appeal.

claims for abuse of the writ. *Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078. Under the abuse of writ doctrine, the new claims may be dismissed on the ground that the petitioner failed to raise the claims in his earlier petition through inexcusable neglect. *See Moore v. Butler*, 819 F.2d 517, 519 (5th Cir.), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3201, 96 L.Ed.2d 688 (1987) (quoting *Jones v. Estelle*, 722 F.2d 159, 163 (5th Cir.1983) (en banc), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2356, 80 L.Ed.2d 829 (1984)). The Supreme Court recently clarified that the standard for abuse of the writ through inexcusable neglect is "cause and prejudice". *See McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). Once the state pleads with clarity and particularity that the petitioner has abused the writ through inexcusable neglect, the burden then shifts to the petitioner to show a cause which excuses his failure to include the new claim in his first petition and actual prejudice resulting from the omission. *Id.*

Cause requires a showing that the failure to file the claim in the first petition was due to some objective factor such as interference by officials which made filing the claim impracticable, reasonable unavailability of the factual or legal basis for the claim, and constitutionally ineffective assistance of counsel. *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). The court must examine "whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *McCleskey*, ___ U.S. at ___, 111 S.Ct. at 1472. Prejudice requires a showing of actual prejudice amounting to a denial of fundamental fairness. *Murray*, 477 U.S. at 494,

106 S.Ct. at 2648. Because the petitioner must show both cause and prejudice, a court need not consider whether there is actual prejudice to the petitioner when he has failed to show cause. *McCleskey*, ___ U.S. at ___, 111 S.Ct. at 1474 (citing *Murray*, 477 U.S. at 494, 106 S.Ct. at 2649.) However, even where the petitioner is unable to show cause, he may still avoid the bar to his new claim if he shows that a "fundamental miscarriage of justice would result from a failure to entertain the claim." *McCleskey*, ___ U.S. at ___, 111 S.Ct. at 1470. This exception to the cause requirement exists where the "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496, 106 S.Ct. at 2649.

In the case at bar, the State has sufficiently pled abuse of the writ. Sawyer's prior writ history reveals that the present petition raises three new claims: 1) Claim 2 alleges that Sawyer was incompetent to proceed to trial and that this fact would have been discovered but for the inadequate psychiatric evaluation rendered by the sanity commission; 2) Claim 4 alleges that Louisiana's electric chair is defectively designed so that it causes unnecessary mutilation and torture, and that these defects are such that even greater harm may be caused during future execution; and 3) Claim 6 alleges that th State withheld exculpatory evidence. Thus, Sawyer must show a legitimate cause for failing to file these claims in his first federal habeas petition.

Claim 2: Competency to Proceed to Trial

Sawyer makes absolutely no showing as to why this claim was not included in his first petition. There is no

dispute that the question of Sawyer's competency was raised prior to his trial. He had sufficient basis to raise the competency issue on his first habeas proceeding. In addition, Sawyer has not offered any evidence of innocence to satisfy the fundamental miscarriage of justice exception to the cause requirement. Accordingly, Claim 2 is barred under Rule 9(b) as an abuse of the writ.

Claim 4: Louisiana's Electric Chair is Defectively Designed

Sawyer argues that State has concealed since Wayne Williams' execution in 1983, that its electric chair has design defects which cause mutilation and torture. While there is no evidence to show concealment, it is a fact that Louisiana does not maintain any maintenance or repair records on the electric chair, reports about the executions, or documentation on the post-execution condition of the prisoner's body.

In support of Claim 4, Sawyer submitted significant evidence that was not in existence at the time of his first habeas proceeding. This evidence is affidavits from people who witnessed executions in Louisiana after the time Sawyer filed his first federal habeas petition. These eyewitness affidavits are crucial to his claim given Louisiana's lack of official documentation on the electric chair and executions. It cannot seriously be disputed that Sawyer will suffer actual prejudice if Louisiana's electric chair does not meet constitutional standards. As Sawyer has demonstrated both cause and prejudice, the Court finds that Claim 4 is not an abuse of the writ. The merits of this claim are discussed in section IV below.

Claim 6: Failure to Reveal Exculpatory Evidence

Sawyer contends that the State hid exculpatory evidence. Specifically, Sawyer contends that despite a pretrial request for "any exculpatory evidence favorable to the defendant," the State concealed that: 1) its key witness, Cynthia Shano, was promised immunity in exchange for her testimony; 2) Wayne Shano, the four-year-old son of Cynthia Shano, told a police detective that Sawyer did not set Arwood on fire and tried to stop Lane from doing so; 3) Cynthia Shano knew Charles Lane prior to the commission of the crime; and 4) Cynthia Shano lied when she testified at trial that she does not drink.

The evidence supporting Sawyer's allegation that Shano was promised immunity is seven affidavits from people who know her stating that she either told them or told someone else who repeated to them that she made a deal with the State to testify against Sawyer in order to save herself. Likewise, an affidavit is the supporting evidence for Sawyer's allegation that Wayne Shano exculpated Sawyer. Diane Thibodeaux, a close friend of Cynthia Shano, states in her affidavit that she was present when the police detective interviewed Wayne Shano, and that Wayne said "daddy tried to help the lady"[9] and that the "other man" had lit Arwood on fire. The evidence supporting Sawyer's claim that Cynthia Shano knew Charles Lane prior to the murder is a 1981 letter from William Rausch to Shano. At that time Rausch was a prisoner at the Jefferson Area Community Correction Center. In his letter he states that he spoke with Charles

[9] Wayne Shano called Robert Sawyer "Daddy", but Sawyer was not Wayne's father.

Lane in prison and Lane indicated that he was a good friend of Shano's. Finally, the evidence supporting the claim that Shano lied on the stand about her drinking consists of the prosecutor's handwritten notes for his direct examination of Detective Geiling which indicate that the investigating detective smelled the odor of alcohol on Shano's breath.

Sawyer offers no explanation for failing to produce this evidence on his first federal habeas petition. The legal and factual support for this claim was reasonably available at the time of Sawyer's first petition. There is no reason why the affidavits in support of this claim could not have been obtained earlier. With respect to the evidence that Lane knew Shano before the murder, the letter from Rausch to Shano was available from the District Attorney, who gave open file discovery to Sawyer's first habeas counsel. Likewise, the notes regarding the odor of alcohol on Cynthia Shano's breath could have been found in the District Attorney's files.

Sawyer does not allege that his first habeas counsel was constitutionally ineffective for failing to investigate and obtain this evidence. The Court nevertheless addresses the issue here in the interest of avoiding any further delays. In order to demonstrate ineffective assistance of counsel, a petitioner must show that his counsel's performance is constitutionally ineffective under the standard established in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984): (1) that his attorney's performance fell below an objective standard of "reasonably effective assistance"; and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different." Even if Sawyer's first habeas counsel erred in failing to obtain this evidence[10], Sawyer cannot show that he was prejudiced.

It is unlikely that any of this evidence would have supported habeas relief in the first proceeding because of the unlikelihood that the evidence would have changed the outcome of the trial. *See U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (to obtain relief for a failure to reveal exculpatory evidence it must be shown that the suppressed evidence would have an effect on the outcome of the trial.) There is substantial evidence that the State did *not* offer Shano a deal for immunity, *see* affidavits of Cynthia Shano and former District Attorney, Phillip Boudesque, and that Wayne Shano *implicated* his father when he was questioned by the police detective, *see* police report of Detective Paul E. Livaudais. In addition, the letter from Rausch to Shano is dated January 27, 1981, subsequent to Sawyer's September, 1980 trial and conviction. Thus, the State did not have any knowledge of the letter at the time of Sawyer's trial. With respect to the odor of alcohol on Shano's breath, there was other evidence of Shano's drinking that could have been used to impeach her, *see* Police Report, and, in any event, it is highly unlikely that such evidence would have effected the outcome of the trial given the overwhelming evidence of Sawyer's guilt.

Thus, Sawyer has not shown cause for failing to present this claim in his prior petition. Sawyer also has

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[10] The Court makes no finding that Sawyer's first habeas counsel rendered less than "reasonably effective assistance."

failed to show that a fundamental miscarriage of justice will result if the Court does not rule on the merits of Claim 6. The evidence of Sawyer's guilt is so overwhelming that even considering the allegedly exculpatory evidence, it cannot be said that the alleged failure to reveal that evidence resulted in the conviction of an innocent man.

IV.

After reviewing the pleadings, the Court determined that an evidentiary hearing on Claim 4 was warranted due to the conflicting affidavits from the parties' experts.[11] At the conclusion of the hearing, the Court

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[11] One of the expert affidavits submitted by Sawyer in support of Claim 4 is the affidavit of Fred Leuchter. The Court recently read in the Times-Picayune newspaper that Leuchter was charged by the State of Massachusetts with practicing engineering without a license. *See* Times-Picayune, June 19, 1991, at A-11. The article reported that on June 11, 1991, Leuchter signed a consent agreement with the Massachusetts board that licenses engineers stating: "I am not and never have been registered as a professional engineer" and that he had nevertheless represented himself as an engineer in several dealings with various states that use the death penalty. The agreement also required Leuchter to stop disseminating the "Leuchter Report" in which he purports to be an engineer and offers the view that the gas chambers in Nazi concentration camps were never used for mass killings. *Id.*

Leuchter's affidavit in the case at bar states: "I have been involved in electrical engineering work for 26 years." Interestingly, although Sawyer relied to a great extent on Leuchter's affidavit in his petition for habeas corpus, he did not call Leuchter as a witness at the evidentiary hearing, nor did he offer his affidavit as evidence.

found that Louisiana's electric chair meets constitutional standards. The Court rendered oral reasons and advised the parties that written reasons would follow in this opinion. The Court's reasons are set forth below.

The issue presented in Claim IV is whether the electric chair used by the State of Louisiana is defectively designed in such a manner that execution in the chair will result in unnecessary pain and suffering in violation of the Eighth Amendment of the United States Constitution, which proscribes cruel and unusual punishment. Any argument that execution by electrocution is unconstitutional per se is foreclosed by legal precedent. *See e g, In re Kemmler,* 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947).

Louisiana's electric chair uses head and leg electrodes to deliver current to the prisoner's body. The purpose of the head electrode is to deliver current directly to the brain to render the prisoner unconscious and block his ability to feel pain. The evidence is that electrocution in Louisiana's electric chair can cause some blistering and burning in the areas where the electrodes are strapped to the head and legs. There are two aspects of the design of the chair that are responsible for the burning: 1) the elongated shape of the head electrode accentuates the leading edge effect, which causes current density between the end of the head electrode and the ear[12]; and 2) some resistance is created by air in the

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[12] The leading edge effect is based on the principle that current tries to travel the shortest path. The theory as it applies

(Continued on following page)

natural cavities of the sponges placed between the electrode and the prisoner's skin. These conditions create electrical resistance and thereby result in some electricity being channelled away from the brain. There was also testimony that the placement of the leg electrodes near the knee and shin in a thin skin area could cause burning.

Sawyer's expert, Dr. John Webster, concluded that these conditions resulted in unnecessary burning and mutilation. The State's expert, Dr. Michael Morse, concluded that while a circular head electrode would be an improvement to the elongated shape, the difference is not significant because enough current still reaches the brain to render the prisoner unconscious. Morse further testified that despite the air in the sponge, the resistivity of the natural sponge is a proper level to carry out a humane execution. He also testified that it was advisable to wring out the sponge in order to prevent moisture from dripping onto the electrode straps. Both experts agreed that the leg straps should be very secure to prevent arcing.

The fact that the design of Louisiana's electric chair is subject to improvement, does not necessarily mean that an execution in the chair will not meet constitutional standards. To meet constitutional muster, an execution, as much as humanly possible, should minimize the risk of unnecessary pain, violence and mutilation. *See Glass v.*

(Continued from previous page)

in this case is that due to the elongated design of the electrode, the narrow end of the electrode, or the leading edge, is closer to the leg electrode than any other part of the head electrode resulting in a concentration of current under the leading edge.

Louisiana, 471 U.S. 1080, 1086, 105 S.Ct. 2159, 2163, 85 L.Ed.2d 514 (1985). "The State is not required to employ the most modern state of the art technology in implementing the death penalty or to foresee and meet every problem which conceivably could ever arise during an execution." *Buenoano v. Dugger*, 1990 WL 119637 (M.D.Fla. June 22, 1990) (citing *Glass*, 471 U.S. at 1086, 105 S.Ct. at 2163).

The Court accepts the testimony of the State's expert that electrocution in the manner performed by the State of Louisiana provides sufficient current to the brain to result in instantaneous disruption of the brain's ability to operate, immediately rendering the condemned unconscious and unable to feel pain. Although there may be some injury to the body, there is no perception of pain. For this reason, Louisiana's electric chair does not cause wanton or unnecessary infliction of pain. Accordingly, the Court finds that the design of Louisiana's electric chair does not violate the mandates of the Eighth Amendment. *See Ritter v. Smith*, 568 F.Supp. 1499, 1526-27 (S.D.Ala.1983), *aff'd in part and rev'd in part on other grounds*, 726 F.2d 1505 (11th Cir.), *cert. denied*, 469 U.S. 869, 105 S.Ct. 218, 83 L.Ed.2d 148 (1984) (a properly performed electrocution "involves an instantaneous blocking of any sensory perceptions or instantaneously rendering the person unconscious so that he was unable to feel any pain. . . . ")

While Claim IV raises only the issue of defective design, testimony was introduced relating to the operation and maintenance of the electric chair, as well as the

procedures for carrying out an execution. On these matters, the evidence is that Louisiana's operation, maintenance, and procedures are appropriate to carrying out constitutional executions by electrocution. The evidence established no constitutional violation.

V.

In conclusion, all of the claims raised in this petition, except Claim 4, are barred under Rule 9(b). Sawyer is not entitled to habeas corpus relief on Claim 4 because he has failed to establish a constitutional violation.

Accordingly,

IT IS ORDERED that the petition for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that judgment shall be entered against the petitioner, Robert Sawyer, and in favor of the respondent, John Whitley, Warden, Louisiana State Penitentiary, Angola, Louisiana DISMISSING WITH PREJUDICE the Petition for Writ of Habeas Corpus. IT IS FURTHER ORDERED that the stay of execution entered on December 12, 1990 is VACATED[13].

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[13] The Louisiana Legislature recently amended and reenacted Louisiana Revised Statute § 15:569(A) and (B) to make lethal injection the manner of execution for every sentence of death executed after September 15, 1991. 1991 La.Act 159 (July 2, 1991). The amended statute reads as follows:

§ 569. Place for execution of death sentence; manner of execution

(Continued on following page)

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A. Every sentence of death executed in this state prior to September 15, 1991, shall be by electrocution, that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.

B. Every sentence of death executed on or after September 15, 1991, shall be by lethal injection: that is, by the intravenous injection of a substance of substances in a lethal quantity into the body of a person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.

Having found that Louisiana's electric chair meets constitutional standards, there is no reason to maintain the stay of Sawyer's execution until September 15, 1991.

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. 91-6382

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME II

NICHOLAS J. TRENTICOSTA*
R. NEAL WALKER
SARAH L. OTTINGER
210 Baronne St.
Suite 608
New Orleans, Louisiana
70112
Telephone: (504) 522-0578
Counsel for Petitioner

JOHN M. MAMOULIDES
District Attorney
24th Judicial District
Parish of Jefferson
State of Louisiana

DOROTHY PENDERGAST*
Assistant District
Attorney
Courthouse Annex
Gretna, Louisiana
70053
Telephone: (504) 386-1020
Counsel for Respondent

*Counsel of Record

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Robert Wayne SAWYER,
Petitioner-Appellant,

v.

John WHITLEY, Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 91-3658.

United States Court of Appeals,
Fifth Circuit.

Oct. 10, 1991.

Petitioner filed first petition for writ of habeas corpus in federal court after he was convicted of capital murder and the Louisiana Supreme Court, 442 So.2d 1136, affirmed. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., denied petition and appeal was taken. The Court of Appeals, 848 F.2d 582, affirmed. On grant of rehearing en banc, the Court of Appeals, 881 F.2d 1273, affirmed. Certiorari was granted. The United States Supreme Court, 110 S.Ct. 2822, affirmed. Thereafter, second petition for federal habeas corpus relief was filed. The District Court, 772 F.Supp. 297, denied relief, and petitioner applied for certificate of probable cause. The Court of Appeals, King, Circuit Judge, held that: (1) in order to demonstrate actual innocence to permit court to consider merits of abusive claims that fail cause and prejudice requirement, as well as successive claim, petitioner must demonstrate, under all evidence that was and arguably could have been presented, that jury would not have been authorized to sentence him to death, and (2) petitioner failed to demonstrate actual innocence.

Affirmed.

Sarah L. Ottinger, Nicholas T. Trenticosta, R. Neal Walker, New Orleans, La., for Robert W. Sawyer.

Dorothy Ann Pendergast, Terry M. Boudreaux, Asst. Dist. Atty., Gretna, La., Annette Marie Viator, La. Dept. of Corr., Baton Rouge, La., for John P. Whitley.

Dana E. Parker, William C. Zapalac, Asst. Attys. Gen., Austin, Tex., for amicus State of Tex.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before KING, DAVIS and SMITH, Circuit Judges.

KING, Circuit Judge:

After granting Robert Sawyer a certificate of probable cause and a stay of execution, we review the merits of his second federal habeas petition. Sawyer presents one successive claim and two abusive claims in this second petition.[1] He repeats the claim that his counsel was ineffective in failing to present at the sentencing phase of his capital murder trial evidence of his mental impairment. We dismiss this successive claim because Sawyer fails to show that he is "actually innocent" of the death penalty. Sawyer contends for the first time in his second petition

[1] Sawyer presented three additional claims challenging the constitutionality of death by electrocution in Louisiana's electric chair in his application for a certificate of probable cause. On July 2, 1991, however, the Louisiana legislature amended its statute to require that every sentence of death executed on or after September 15, 1991, be by lethal injection. This change of law rendered these three claims moot.

(1) that he was incompetent to stand trial and (2) that the State withheld vital exculpatory evidence against him. We also dismiss these abusive claims because we find that Sawyer neither establishes cause and prejudice nor shows that he is actually innocent of his conviction or sentence. We affirm the district court's judgment dismissing Sawyer's request for habeas corpus relief and vacate his stay of execution.

1. BACKGROUND

A Louisiana state jury condemned Robert Sawyer to death in 1980 for the murder of Frances Arwood,[2] who was staying with Sawyer and Cynthia Shano, Sawyer's fiancee, and was helping to care for Shano's children. After a night of drinking, Sawyer and Shano returned to their home with an acquaintance, Charles Lane. Sawyer argued with Arwood and accused her of giving pills to one of Shano's children. The argument escalated to violence. Sawyer and Lane beat Arwood, scalded her with boiling water, and finally burned her scalded and unconscious body with lighter fluid.[3] She died several weeks later as a result of this vicious attack.

A state trial court convicted Sawyer of capital murder, and the Louisiana Supreme Court affirmed Sawyer's conviction and sentence of direct appeal. *See State v.*

[2] The details of Sawyer's horrifying crime have been recounted a number of times. *See, e.g., Sawyer v. State*, 442 So.2d 1136, 1136-37 (La. 1983).

[3] Lane was also convicted of first degree murder in a separate trial, but he received a sentence of life. *See State v. La[illegible]*, 414 So.2d 1223 (La. 1982).

Sawyer, 422 So.2d 95 (La. 1982). The United States Supreme Court vacated and remanded to the Louisiana Supreme Court for consideration of the sentence under *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court again affirmed the conviction and sentence. *See State v. Sawyer*, 442 So.2d 1136 (La.1983). Sawyer filed a petition for state post-conviction review, and after an evidentiary hearing, the state trial court denied relief. Sawyer then sought a writ of habeas corpus in the Louisiana Supreme Court, which denied his application without written opinion. *See Sawyer v. Maggio*, 479 So.2d 360 (La. 1985).

In 1986, Sawyer filed his first petition for federal habeas corpus relief, raising eighteen claims, including ineffective assistance of counsel, all of which the court addressed on the merits and denied. A panel of this court affirmed that denial on appeal. *See Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).[4] We then granted rehearing *en banc* and upheld the panel's opinion. *See Sawyer v. Butler*, 881 F.2d 1273 (5th Cir. 1989) (*en banc*), *cert. granted*,

[4] On appeal, Sawyer raised only three challenges to his conviction and sentence: 1) whether he was denied effective assistance of counsel; 2) whether he was denied due process because the trial court failed to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar at least five years; and 3) whether prosecutorial misconduct erroneously misled the jury as to its role in the death penalty determination. In addition, Sawyer challenged the district court's application of a prejudice requirement on the claim of prosecutorial misconduct.

___ U.S. ___, 110 S.Ct. 835, 107 L.Ed.2d 830 (1990). The United States Supreme Court affirmed.[5] *See Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

Sawyer next filed a second state post-conviction petition. On October 5, 1990, the state trial court summarily denied Sawyer's application as repetitive and without merit. The Louisiana Supreme Court denied Sawyer's supervisory writ without opinion on October 7, 1990.

On October 8, 1990, Sawyer filed his second petition for federal habeas corpus relief. The district court granted a stay of execution, and, following an evidentiary hearing, rejected one of Sawyer's claims on the merits and the remaining claims as barred under Rule 9(b) of the Rules Governing Section 2254 Cases, 772 F.Supp. 297. The district court also vacated its stay of execution and denied a certificate of probable cause to appeal. Sawyer applied to this court for a certificate of probable cause. We granted the certificate on the ground that his case presented a question which is debatable among jurists of reason and has not yet been fully addressed in this circuit: what it means to be "actually innocent" of the death penalty in

[5] The Court considered only whether a prisoner whose murder conviction became final before the decision in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which prohibits the imposition of a death sentence where the prosecutor's closing arguments diminished the jury's sense of responsibility for imposing a capital sentence, is entitled to use that decision to challenge his capital sentence in a federal habeas corpus action. The Court ruled that he could not, because *Caldwell* announced a new rule and did not come within the exception for rules necessary for fundamental fairness of the criminal proceeding.

determining whether to entertain a successive claim or an abusive claim that fails to meet the cause and prejudice requirement.

II. ANALYSIS

A. Standard of Review

Because this is Sawyer's second federal habeas petition, we first must determine whether we can reach the merits of his claims. *See* 28 U.S.C. § 2244(b) (1988); Rule 9(b) of Rules Governing Section 2254 Cases (constraining the ability of federal courts to entertain the merits of subsequent or successive claims). When a condemned prisoner presents successive petitions for a writ of habeas corpus, the state has a legitimate interest in preventing the prisoner from abusing the writ and using successive petitions as a mere delaying tactic. If the petitioner raises a claim that a federal court has already considered in a previous habeas corpus petition, we may review the merits of the successive claim only when "the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364 (1986) (plurality opinion); *see also McCleskey v. Zant*, ___ U.S. ___, ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991); *Williams v. Lynaugh*, 837 F.2d 1294, 1295 (5th Cir. 1988); *cert. denied*, 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 605 (1989).

If the petitioner raises a new claim in a second or successive habeas petition, we may review that claim on the merits only if the petitioner's failure to raise the claim in the prior petition was not due to inexcusable neglect. *See Moore v. Butler*, 819 F.2d 517, 519 (5th Cir.), *cert. denied*,

482 U.S. 920, 107 S.Ct. 3201, 96 L.Ed.2d 688 (1987) (quoting *Jones v. Estelle*, 722 F.2d 159, 163 (5th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2356, 80 L.Ed.2d 829 (1984)). The state bears the burden of pleading abuse of the writ. *See id.* Once the state has met its burden of pleading, the petitioner must disprove that he has abused the writ by showing cause for failure to bring the claim in the first federal habeas petition, and actual prejudice that results from the errors that gave rise to the claim. *McCleskey*, 111 S.Ct. at 1470.

In order to demonstrate cause, the petitioner must show that the failure to raise the claim in his first petition was due to some objective external factor such as interference by officials. *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). The court must examine "whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *Id.* ___ U.S. at ___, 111 S.Ct. at 1472. "Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim." *Id.* Prejudice requires a showing of actual prejudice amounting to a denial of fundamental fairness. *Carrier*, 477 U.S. at 494, 106 S.Ct. at 2648.

A court need not consider whether there is actual prejudice to the petitioner when he fails to show cause. *McCleskey*, ___ U.S. at ___, 111 S.Ct. at 1474 (citing *Carrier*, 477 U.S. at 494, 106 S.Ct. at 2648). "If the petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would

result from a failure to entertain the claim." *Id.* ___ U.S. at ___, 111 S.Ct. at 1470. A "fundamental miscarriage" implies that the "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496, 106 S.Ct. at 2649. *McCleskey* harmonized the *Kuhlmann* "colorable showing of factual innocence" requirement with the "actual innocence" that a petitioner must show to avoid the cause and prejudice requirement for abusive claims. Thus, a showing of actual innocence triggers our authority to consider the merits of abusive claims that fail the cause and prejudice requirement as well as successive claims.

B. *The Actual Innocence Exception*

The Supreme Court first considered actual innocence as a limitation on hearing successive federal habeas petitions in *Kuhlmann*, which sought to clarify this "ends of justice" requirement implicit in 28 U.S.C. § 2244(b),[6] which restricts a federal court's authority to review the merits of a successive claim. In balancing a prisoner's interest in testing the constitutionality of his confinement

[6] *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) drew the "ends of justice" limitation from the version of 28 U.S.C. § 2244 in effect at that time. *Kuhlmann*, 477 U.S. at 448, 106 S.Ct. at 2624. The current version of the statute explicitly incorporates the phrase into subsection (a), which deals with federal prisoners, but not into subsection (b), which deals with state prisoners. *See* 28 U.S.C. § 2244(a)-(b) (1988). Nonetheless, *Kuhlmann*, holds that § 2244(b) continues to require an "ends of justice" inquiry because of the limited discretion it still affords to federal courts presented with successive state claims. *See* 477 U.S. at 451, 106 S.Ct. at 2625.

against the state's interest in the administration of its criminal statutes, and particularly in the finality of its judicial decisions, a four-Justice plurality determined that the ends of justice required "federal courts to entertain such petitions only where the prisoner supplements his claim with a colorable showing of factual innocence." The *Kuhlmann* plurality drew from Judge Friendly's seminal article on federal habeas review[7] and *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in articulating a standard for assessing factual, or actual, innocence:

> [T]he prisoner must show a fair probability that, in light of all of the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after trial, the trier of fact would have entertained a reasonable doubt as to his guilt.

Kuhlmann, 477 U.S. at 455 n. 17, 106 S.Ct. at 2627 n. 17 (quoting Friendly, *supra* note 7, at 160).

On the same day *Kuhlmann* was decided, the Supreme Court also considered two habeas cases presenting abusive claims. A petitioner ordinarily must demonstrate cause for his abuse of the writ and prejudice resulting from the alleged constitutional error before a federal court can address the merits of a claim brought for the first time in a second habeas petition. A majority held that a showing of actual innocence would excuse a

[7] Henry J. Friendly, *Is Innocence Irrelevant: Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970).

petitioner from the cause and prejudice requirement. *See Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 2667-68, 91 L.Ed.2d 434 (1986). The Court reasoned that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent," failure to consider a procedurally defaulted habeas claim would result in a "fundamental miscarriage of justice." *Carrier*, 477 U.S. at 495-96, 106 S.Ct. at 2649.

Smith specifically considered the application of this exception in the capital sentencing context. The *Smith* Court acknowledged that "the concept of 'actual', as distinct from 'legal' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." 477 U.S. at 537, 106 S.Ct. at 2668. Nonetheless, the Court decided that Smith's claim did not fall within the actual innocence exception, because, as the alleged error neither introduced false facts nor precluded the development of true ones, it did not prevent even "the risk of a manifest miscarriage of justice." *Id.* at 538, 106 S.Ct. at 2668.

In arriving at this conclusion, the Court focused specifically on whether the allegedly erroneous admission of the psychiatrist's testimony undermined the accuracy of the jury's factual finding that Smith was a continuing threat to society, a statutory aggravating circumstance. The Court assumed that the challenged evidence had been improperly admitted, and that but for its admission, the jury probably would have imposed a life sentence instead of death. *Id.; see also Johnson v. Singletary*, 938 F.2d 1166, 1182 (11th Cir. 1991) (en banc) (observing that *Smith*

Court assumed that Smith was "legally innocent"). In analyzing Smith's claim, the Court asked "whether *in fact* petitioner constituted a continuing threat to society." *Smith*, 477 U.S. at 538, 106 S.Ct. at 2668. The way that the Court framed this question indicates that an inquiry into accuracy was relevant specifically because the challenged finding of fact, if incorrect, could have led the jury to err in finding Smith guilty of an aggravating circumstance under Virginia law.

The Court's ultimate refusal to consider Smith's claim on the merits also indicates the necessary content of a showing of actual innocence of the death penalty. Virginia requires the jury to find at least one aggravating circumstance before it can recommend a death sentence. *See Briley v. Bass*, 584 F.Supp. 807, 840 (E.D.Va.), *aff'd*, 742 F.2d 155 (4th Cir.), *cert. denied*, 469 U.S. 893, 105 S.Ct. 270, 83 L.Ed.2d 206 (1984). If Smith had challenged both of the aggravating circumstances that the jury found to recommend his death sentence, the jury could have imposed a sentence of which Smith was actually innocent, because the absence of both of the statutory aggravating circumstances would have prevented the jury from imposing the death penalty as a matter of state law. In dismissing Smith's claim, the Court seems to have implied that a claim that challenged only one aggravating circumstance was "unrelated to [actual] innocence," and thus failed to present the risk of a fundamental miscarriage of justice. *See* 477 U.S. at 539, 106 S.Ct. at 2669; *accord Johnson*, 938 F.2d at 1182 (en banc).

In cases following *Smith*, the Supreme Court has continued to adhere to the view that actual innocence requires more than showing a constitutional error, even

one that results in the admission of false or misleading facts, and even if the verdict or sentence would have been different absent the error. In *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), the Court implied that a petitioner does not show actual innocence by raising a claim that affects the fundamental fairness or the accuracy of a proceeding even if it presents a likelihood that the error actually influenced the sentence imposed. The Court observed that while "the trial judge in this case found an equal number of aggravating and mitigating circumstances," this fact was insufficient to show that an error in sentencing instructions caused a fundamental miscarriage of justice. *Id.* at 412 n. 6, 109 S.Ct. at 1217-18 n. 6. In the same discussion, the majority criticized as overbroad Justice Stevens' miscarriage of justice occurs whenever "there is a substantial claim that a constitutional violation undermined the accuracy of the sentencing decision." *Id.* at 423, 109 S.Ct. at 1223-24 (Stevens, J., dissenting).

This past term, the Court again recognized the actual innocence exception in *McCleskey*, in the context of abusive claims. *McCleskey* reiterated that a fundamental miscarriage of justice is shown only in those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." ___ U.S. at ___, 111 S.Ct. at 1470 (citing *Carrier*). After observing that the fundamental miscarriage of justice exception "gives meaningful content to the otherwise unexplained 'ends of justice' inquiry" mandated by *Sanders*,[8] the Court embraced the *Kuhlmann* plurality's

[8] 373 U.S. 1, 15-17, 83 S.Ct. 1068, 1077-78, 10 L.Ed.2d 148 (1963).

"factual innocence" inquiry as to the primary source of this content. *See id.* ___ U.S. at ___, 111 S.Ct. at 1471.

Although this circuit has addressed claims involving the actual innocence exception in the sentencing context before, we have not yet endeavored to define it precisely.[9] In *Cuevas v. Collins*, 932 F.2d 1078 (5th Cir. 1991), we held that the petitioner did not come within the exception, and merely observed that his claim did not present "sufficient risk of an erroneous sentence as to implicate actual innocence." *Id.* at 1083. We addressed the issue in two other cases, but found again that the weak factual support for those claims did not compel a considered analysis of the exception.[10]

At this juncture, we believe that it is helpful to set forth a standard for assessing whether successive and abusive claims qualify for this rare exception. We extract the standard from Supreme Court case law, examine the rationale supporting it, and apply it to this case.

One can fairly view with skepticism the proposition that a convicted defendant can be actually innocent of a sentence which is normally left to the discretion of the judge virtually free of substantive control or guidance. But the Supreme Court has recognized that in an important and controlling respect, a death sentence is different from any other kind of sentence. The Supreme Court has

[9] We have considered the application of the exception in the guilt-innocence phase. *See, e.g., United States v. Shaid*, 937 F.2d 228, 232-36 (5th Cir. 1991) (en banc).

[10] *See Jones v. Whitley*, 938 F.2d 536 (5th Cir. 1991); *Bird v. Collins*, 934 F.2d 629 (5th Cir. 1991).

held that in order to comply with the Eighth Amendment, a death sentence must be imposed under a structure that specifically narrows the circumstances under which it may be imposed. *E.g., Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Many states, including Louisiana, have complied with the Court's construction of the Eighth Amendment by adopting statutes that set forth certain aggravating circumstances, at least one of which must be found before the jury is authorized to impose the death penalty. As the Court recognized in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), with respect to the Missouri death penalty statute, "[b]y enacting a sentencing procedure that resembles a trial on the issue of guilt or innocence, Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.' " *Id.* at 446, 101 S.Ct. at 1862 (emphasis in the original). Because of the similarity between a trial on guilt or innocence and a capital sentencing proceeding, the Court held that the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available at his retrial to one who has earlier been, in effect, acquitted of a death penalty. *Id.* We think that the Court's willingness in *Smith* to consider Smith's claim that he was actually innocent of his death sentence is premised on the distinction that the Court drew in *Bullington* between a death sentence and other sentences, and that distinction

informs our view as to the content of the standard we set forth today.

Justice Powell's cogent dissent in *Bullington* did not necessarily disagree with the majority's explanation of capital sentencing. Instead, Justice Powell chose to emphasize the inherent difference between reviewing the validity of the sentencing phase and that of the guilt-innocence phase of a criminal trial:

> Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable triers of fact to discover that truth according to law. But triers of fact can err, and an innocent person can be pronounced guilty. In contrast, the law provides only limited standards for assessing the validity of a sentencing decision. The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them. Absent a mandatory sentence, there is no objective measure by which the sentencer's decision can be deemed correct or erroneous *if it is duly made within the authority conferred by the legislature.*

Id. at 450, 101 S.Ct. at 1864 (1981) (Powell, J., joined by Burger, C.J., and White and Rehnquist, JJ., dissenting) (emphasis added). Both the majority and the dissent in *Bullington* guide our analysis. The similarities between a guilt-innocence determination and a capital sentencing decision allow us to translate actual innocence into the sentencing phase; the differences inform the manner in

which we review a claim of actual innocence of a capital sentence.

A claim of actual innocence must do more than "call into question the reliability of an adjudication of legal guilt," *Carrier*, 477 U.S. at 495, 106 S.Ct. at 2649, or here, the reliability of the jury's imposition of the death penalty. *See Adams*, 489 U.S. at 412 n. 6, 109 S.Ct. at 1217-18 n. 6. It must challenge the facts which triggered the jury's authority to impose the death penalty. In assessing when a habeas petitioner can be actually innocent of the crime of which he was convicted, the plurality in *Kuhlmann* focused on whether the petitioner had shown a fair probability that, in the light of all the evidence, the trier of fact would have entertained a reasonable doubt as to his guilt.[11] Translating *Kuhlmann's* guilt-innocence phase test to the sentencing phase, then, we must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability[12] that a rational trier of

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[11] The *Kuhlmann* plurality incorporated Judge Friendly's proposal in articulating this standard. *See* 477 U.S. at 455 n. 17, 106 S.Ct. at 2627 n. 17 (specifying that "all of the evidence" includes " 'that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial' " (quoting Friendly, *supra* note 7, at 160)).

[12] The use in *Kuhlmann* and succeeding Supreme Court cases, and our use, of the term "fair probability" as an indication of the threshold that petitioner must reach does not in any way detract from the premise of *Jackson* that the evidence is sufficient so long as a rational juror can find a pathway through all the evidence to convict (or, as here, sentence) the

(Continued on following page)

fact[13] would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law[14] for the imposition of the death

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defendant. Under *Jackson*, a trier of fact is free to choose among reasonable constructions of the evidence. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

[13] We have used the term "trier of fact" consistently throughout this opinion, and recognize that usually the jury is the trier of fact. Depending on how a state allocates the responsibility for complying with its own as well as federal requirements in its death sentencing scheme, however, the jury, trial judge, or appellate court may have shared or independent obligations to ensure that death sentence is imposed in accordance with state or federal law. In some circumstances, a trial judge or an appellate reviewing body alone may bear the responsibility for determining the existence of one or more facts that must be found under state or federal law before the death sentence can be imposed. In an instance dealing with such a determination, the inquiry would be whether the body vested with the responsibility for making that determination in the first instance probably would have entertained a reasonable doubt as to the fact that it is required to determine. *See, e.g., Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378-79, 73 L.Ed.2d 1140, 1154 (1982) (reversing Florida Supreme Court decision to affirm death sentence absent trial court finding that accomplice, who did not kill or attempt to kill, intended killing or use of lethal force); *Gregg v. Georgia*, 428 U.S. 153, 191-92, 204-05, 96 S.Ct. 2909, 2933-34, 2939-40, 49 L.Ed.2d 859 (1976) (plurality) (indicating that sentencing authority can be allocated to either court or jury, and holding that state supreme court's capital sentence review procedure assisted in preserving the constitutionality of the state sentencing scheme).

[14] There are several circumstances under which the death penalty is unavailable as a matter of constitutional law. *See,*

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penalty.[15] That is, a petitioner is not actually innocent of the death penalty unless he demonstrates, under all the

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e.g., Thompson v. Oklahoma, 487 U.S. 815, 857-78, 108 S.Ct. 2687, 2711, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring) (persons under 16 years of age when they commit capital offense cannot receive death penalty unless legislature clearly includes them by setting a lower minimum age); *Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987) (minor participation in felony underlying felony murder conviction cannot support death penalty absent finding that defendant exhibited at least reckless disregard for human life); *Ford v. Wainwright*, 477 U.S. 399, 409, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Constitution prohibits executing death sentences of insane persons for the duration of their insanity); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (plurality) (rape conviction cannot serve as basis for death sentence).

[15] *See also Johnson*, 938 F.2d at 1183. In *Johnson*, the Eleventh Circuit recently proposed a standard to assess whether a petitioner is actually innocent of the death penalty:

> [A] petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty
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> . . . .

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evidence that was an arguably should have been presented, that the jury would not have been authorized to sentence him to death. *See Bullington*, 451 U.S. at 439, 101 S.Ct. at 1858 (distinguishing a death sentence proceeding from other sentencing procedures in which there is "no separate sentencing proceeding at which the prosecution [is] required to prove – beyond a reasonable doubt – additional facts in order to justify the particular sentence.")

Jackson v. Virginia, which provided the foundation for the *Kuhlmann* test, carefully limited the role of courts in conducting a sufficiency of the evidence review. *Jackson* directed the reviewing court to examine all of the evidence "in the light most favorable to the prosecution." 443 U.S. at 319, 99 S.Ct. at 2789. The Court explained that it imposed this requirement so that the review would "impinge[] on 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* The Court further reasoned:

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Id. (emphasis in original). The test we set forth here emerges from the same fundamental concerns discussed by the *Johnson* en banc majority. In devising a framework for reviewing actual innocence of the death penalty, we recognize that the broad discretion afforded to sentencing bodies under both federal and state law leaves few objective criteria upon which we can decide whether a sentencer had the authority to impose the death penalty. *See id.* Our test also recognizes that both state and federal requirements imposed on death penalty schemes affect the inquiry into actual innocence of the death sentence. *See id.* at 1186, 1191, 1194-95 (Tjoflat, C.J., concurring and dissenting).

> The question of whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the fact finder – if known.

Id. n. 13. The core concern of the *Jackson* Court, in designing the sufficiency review, was to insulate the discretionary function of the jury from judicial scrutiny. This concern constrains our review of a claim of actual innocence of a capital sentence to only those facts which provide the predicate for the jury's authority to assess the death penalty.

Like the petitioner in *Smith*, Sawyer maintains that his claims, if true, would render him innocent of the death penalty.[16] Therefore, we must consider, based on

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[16] Sawyer urges us to apply a test that first would inquire into whether the alleged constitutional violations in the sentencing phase of his trial "precluded the development of true facts [or] resulted in the admission of false ones." (quoting *Smith*, 477 U.S. at 538, 106 S.Ct. at 2668). He would then have us ask whether there is a fair probability that, but for this alleged error, the trier of fact would not have imposed the death penalty. We do not believe that this test accurately interprets the meaning of actual innocence as presented in *Smith* and cases following. It is true that the *Smith* majority concluded that refusal to consider the merits of Smith's claim would not pose the *risk* of a fundamental miscarriage of justice because the alleged error neither caused the admission of false facts nor precluded the development of true ones. *See* 477 U.S.

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the new evidence he presents viewed in conjunction with all of the evidence admitted in the trial court, whether a fair probability exists that a rational trier of fact would have entertained a reasonable doubt as to the existence of any of those facts which are prerequisites under Louisiana or federal law to the imposition of his death penalty. In order to assess how a rational trier of fact would view the newly proffered evidence, we must understand how

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at 538, 106 S.Ct. at 2668. It is clear, however, that the Court did not intend *Smith* to stand for the converse proposition – that the admission of false facts or the omission of true facts would end the inquiry into whether a petitioner is actually innocent of the death penalty. *Adams* explains that actual innocence requires *more* than a showing that a constitutional violation undermined the accuracy of the sentencing decision. *See* 489 U.S. at 412 n. 6, 109 S.Ct. at 1217-18 n. 6; *see also Johnson*, 938 F.2d at 1182 (factual inaccuracy "may well be necessary to a claim of actual innocence," but is insufficient unless that inaccuracy affects the sentencer's authority to impose the death penalty). Because the test that Sawyer proposes would make actual innocence indistinguishable from a showing of actual prejudice, and thereby turn the exceptional case into an "all too ordinary one," *id.*, we do not adopt it. *See Carrier*, 477 U.S. at 495, 106 S.Ct. at 2649 (clearly distinguishing between actual innocence and actual prejudice, and re-emphasizing that a showing of actual prejudice without showing cause would not permit a court to review the merits of a procedurally defaulted habeas claim); *see also McCleskey*, 111 S.Ct. at 1474-75 (finding that because petitioner lacked cause, the court did not need to consider whether he "would be prejudiced by his inability to raise the alleged *Massiah* [*v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)] violation at this late date," and also concluding that petitioner could not "demonstrate that the alleged *Massiah* violation caused the conviction of an innocent person").

the state statute directs the trier of fact to study the evidence.

Under the Louisiana capital sentencing scheme, the jury is authorized to assess the death penalty so long as it finds at least one statutory aggravating circumstance beyond a reasonable doubt. La. Code Crim.Proc.Ann. Art. 905.3 (West Supp.1991) After it so finds, the statute imposes a procedural requirement that the jury consider any mitigating circumstances before it assesses the death penalty. *Id.*[17] The statute provides a definitive list of aggravating circumstances, Art. 905.4, and a nonexhaustive list of mitigating circumstances. Art. 905.5; *see* 905.5(e) (providing for consideration of "[a]ny other relevant mitigating circumstance"). The finding of one or more mitigating circumstances does not foreclose the jury from imposing the death penalty in the presence of at least one aggravating factor. *See* Art. 905.3. Under the Louisiana scheme, therefore, a rational juror conceivably could choose to give no weight to any of the mitigating factors and impose the death penalty so long as it has found, beyond a reasonable doubt, the existence of a single aggravating circumstance.

It is clear, under the Louisiana scheme, that additional mitigation evidence cannot detract from the jury's ability to find any aggravating factor which supported its

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[17] *See also State v. Sonnier*, 380 So.2d 1, 8 (La.1979) (reversing death sentence in light of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and jury's "apparent disregard" of several mitigating factors).

imposition of the death penalty. The only factual prerequisite to assessing the death penalty imposed by Louisiana law that is relevant here is the finding of an aggravating circumstance beyond a reasonable doubt. In applying the *Jackson v. Virginia* standard of review to a Louisiana death sentence, therefore, we must ask whether a fair probability exists, in light of the evidence tendered to the court on this second habeas review, when examined in conjunction with all the record evidence, that a rational trier of fact would entertain a reasonable doubt as to the existence of each and every one of the aggravating circumstances found by the jury when it originally imposed the death penalty.[18]

Only by demonstrating that a fair probability exists that the jury could not have sentenced him, i.e., would not have been authorized to sentence him, to death as a matter of law can Sawyer show that he is actually innocent of the death penalty. The jury that recommended Sawyer's death sentence found

> (1) that [Sawyer] was engaged in the perpetration of aggravated arson; (2) that the offense was committed in an especially heinous, atrocious and cruel manner; (3) that [Sawyer] was previously convicted of an unrelated murder and sentenced defendant to death. On appeal,

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[18] Only aggravating factors predicate the jury's authority to assess the death penalty under Louisiana law. Therefore, if we were to entertain a claim based on mitigation evidence, we would be compelled to scrutinize the jury's deliberative process, an exercise that the *Jackson* Court explicitly forbade. *See* 443 U.S. at 319 n. 13, 99 S.Ct. at 2789 n. 13.

> this court found that the last aggravating circumstance was not supported by the evidence. . . .

Sawyer v. State, 442 So.2d 1136 (La.1983), *cert. denied*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Therefore, in order to show actual innocence of the death penalty, Sawyer must demonstrate that his newly proffered evidence, when viewed in conjunction with the record evidence, would lead a rational trier of fact to entertain a reasonable doubt as to the findings of both aggravated arson and the "especially heinous, atrocious and cruel manner of death."

C. Claim 1

In his first claim, Sawyer alleges that he was denied effective assistance of counsel and an opportunity for a meaningful and individualized sentencing determination because his trial counsel failed to investigate mitigating evidence and to obtain expert mental health testimony and present such testimony at the sentencing phase of his trial in mitigation of the death penalty. Sawyer specifically raised this same ground for relief in his first habeas petition, and the claim was rejected on its merits. Sawyer now presents additional substantial evidence showing his organic brain damage, moderate mental retardation, and various other mental disorders, as well as childhood abuse and neglect. Specifically, Sawyer shows that he was hospitalized in four mental health facilities, that he received shock therapy, and that he was adjudicated incompetent by the State of Tennessee in

1967. Further, newly submitted mental evaluations suggest that Sawyer's organic brain damage impairs his ability to control his actions. Because Sawyer admits that he raised the claim of ineffective assistance of counsel at the sentencing phase in his prior petition and that it was rejected on the merits, he must supplement his claim by showing a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under Louisiana and federal law for the imposition of the death penalty.

Sawyer asserts that the incompetence of his trial counsel resulted in the introduction of false and misleading facts and precluded the development of true facts concerning his mental status and psychological background. These factual inaccuracies, he claims, foreclosed the jury from considering a statutory mitigating circumstance that should have been applied to his case.[19] Sawyer contends that but for these errors of trial counsel, the

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[19] The relevant mitigating circumstance is as follows:

> At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication[.] La.Code Crim.Proc.Ann. art. 905.5(e).

As the State of Louisiana points out, Sawyer did present a defense of toxic psychosis due to alcohol ingestion when he was tried. He did not, however, raise the issue of his organic brain disorder in his initial trial. Either or both of these defenses, if accepted by the jury, would qualify for this statutory mitigating circumstance.

outcome of the jury's sentencing deliberations would have been different.

Under Louisiana law, mitigation evidence, without more, cannot suffice to demonstrate that a petitioner is actually innocent of the death penalty. Because this evidence does not implicate the validity of the two aggravating circumstances which the jury found in order to impose Sawyer's death sentence, a rational trier of fact still could have recommended the death sentence. Consequently, we must reject this claim as successive without addressing its merits.

D. Claim 2

In his second claim, Sawyer alleges that the issue of his competence to stand trial, although raised at the time of his trial, was not adequately resolved because the sanity commission rendered an incompetent evaluation. Because Sawyer raises this claim for the first time in his second petition for habeas corpus, we may consider it only if he has not abused the writ. Sawyer does not contend that the government or some other external factor obstructed his ability to raise the issue of his incompetency to stand trial in his first federal habeas petition. Sawyer admits that he had been adjudicated incompetent on two separate occasions before he stood trial, and that he had been diagnosed as having moderate retardation and chronic brain syndrome as early as 1965. This type of information could have been discovered through reasonable investigation at or before the time the first habeas petition was filed. We agree with the district court that

Sawyer fails to show cause for not raising this claim in his first habeas petition.

Sawyer urges us to consider incompetency to stand trial as equivalent to being actually innocent of his conviction and sentence. Essentially, Sawyer is contending that the allege Fourteenth Amendment due process violation that caused him to stand trial despite his mental incompetency yields a showing of actual innocence because, but for the constitutional error, he would not have been convicted and sentenced. He does not, however, argue that he was actually innocent of the murder, or of any of the facts which led the jury to find the two valid statutory aggravating circumstances. Since Sawyer does not challenge the critical factual bases for his conviction or sentence, we dismiss this claim without addressing its merits.

E. Claim 3

In his final claim, Sawyer alleges that the State hid exculpatory evidence in violation of Sawyer's rights under the Sixth, Eighth, and Fourteenth Amendments. Sawyer asserts that despite a pre-trial request for "any exculpatory evidence favorable to the defendant," the State concealed that: 1) its key witness, Cynthia Shano, was promised immunity in exchange for her testimony; 2) Wayne Shano, the four-year-old son of Cynthia Shano, told a police detective that Sawyer did not set Arwood on fire and tried to stop Lane from doing so; 3) Cynthia Shano knew Charles Lane prior to the commission of the crime; 4) Cynthia Shano lied when she testified at trial that she does not drink; and 5) the police discovered

another can of lighter fluid near the house the day after the crime was committed.[20]

Sawyer did not raise this claim in his first petition, and the district court rejected the claim because it determined that Sawyer failed to show cause for this omission. Sawyer's claim rests on hearsay statements recalling incidents that happened ten years ago. He does not present a convincing argument that the State obstructed his counsel from deposing these witnesses wither at the time of his criminal trial or his first habeas petition. Indeed, since the State opened its files to Sawyer's counsel when he filed his first federal habeas petition, he cannot assert that any external obstacle barred his access to this information.

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[20] Sawyer submits seven affidavits to support his allegation that Shano was promised immunity. The affiants declare that Shano either told them or told someone else who repeated to them that she made a deal with the State to testify against Sawyer in order to save herself. Another affidavit supports Sawyer's allegation that Wayne Shano exculpated Sawyer. Diane Thibodeaux, a close friend of Cynthia Shano, states in her affidavit that she was present when the police detective interviewed Wayne Shano, and that Wayne said "Daddy tried to help the lady" [Wayne Shano called Robert Sawyer "Daddy", but Sawyer was not Wayne's father.] and that the "other man" had lit Arwood on fire. A 1981 letter from William Rausch to Shano supports Sawyer's claim that Cynthia Shano knew Charles Lane prior to the murder. Rausch wrote the letter while he was a prisoner at the Jefferson Area Community Correction Center. Rausch wrote that he spoke with Charles Lane in prison and Lane indicated that he was a good friend of Shano's. Finally, Sawyer's claim that Shano lied on the stand about her drinking rests solely on the prosecutor's handwritten notes for his direct examination of Detective Geiling which indicate that the investigating detective smelled the odor of alcohol on Shano.

Because the State did not prevent Sawyer from having access to the statements and other materials on which he now bases his claim, he does not show that he could not have obtained, by reasonable means, "a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *McCleskey*, 111 S.Ct. at 1470.

Nor does this evidence raise a fair probability that a rational trier of fact would have entertained a reasonable doubt as to whether to sentence Sawyer to death. Sawyer has not raised any specific facts to show that he is innocent either of the murder of Arwood or of both of the valid aggravating circumstances the jury found before recommending the death penalty. Although some of the evidence might implicate the jury's finding of aggravated arson,[21] it would not lead a rational trier of fact to entertain a reasonable doubt as to the jury finding that the murder of Frances Arwood was committed "in an especially heinous, atrocious and cruel manner." The jury could have looked to circumstances surrounding

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[21] We assume only for purposes of argument that Sawyer's evidence asserts a valid challenge to this jury finding. We observe, however, that Sawyer need not have been the actual perpetrator of the aggravated arson for a jury to find him guilty of that crime. *See La.Rev.Stat.Ann.* art. 14:24 (West 1986) (defining principals of a crime as all persons who aid and abet in the commission of a crime, whether directly or indirectly). He does not contend that he was not present while Frances Arwood was being burned. Furthermore, he does not deny that his fingerprints were found on a can of lighter fluid at the crime scene, a fact which the jury considered in finding aggravated arson.

Arwood's brutal murder other than those giving rise to arson to make this finding.[22]

Moreover, Sawyer's effort to attack the credibility of Cynthia Shano, the State's star witness, would not lead a rational trier of fact to entertain a reasonable doubt as to his guilt of the crime or either of the statutory aggravating circumstances underlying his sentence. Regardless of the evidence now presented, the jury still would have retained the discretion to credit Shano's testimony. This evidence does not implicate any of the findings of fact which entitled the jury to convict and sentence Sawyer to death as a matter of law. We cannot say that this newly tendered evidence of bias, when viewed in conjunction with the evidence presented at trial, would lead a rational juror to entertain a reasonable doubt about whether to convict or sentence Sawyer to death. As a result, we dismiss this claim.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment dismissing Sawyer's request for habeas corpus relief and VACATE his stay of execution.

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[22] As recounted above, Sawyer beat and scalded Arwood with boiling water. *See also Sawyer v. State*, 442 So.2d 1136, 1140 (La.1983) (pointing to "overwhelming evidence of the heinous nature of the principal offense" in affirming Sawyer's sentence). Nothing Sawyer adduces now contradicts the fact that he participated in torturing Arwood.

STATE OF LOUISIANA
VERSUS
ROBERT SAWYER

FILED: ___

24th JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA
NO. 79-2841
SECTION: G

DEPUTY CLERK

MOTION TO APPOINT SANITY COMMISSION AND TO ORDER MEDICAL OBSERVATION AND TESTS

On the motion of the undersigned attorney for Robert Sawyer, appearing herein for the sole purpose of moving the Court to order a medical examination of the defendant and such tests are tests, including but not limited to the following: a brain scan test, which will enable medical experts to determine the lack of mental capacity or the extent of medical capacity of the defendant for the following grounds to wit:

The defendant, Robert Sawyer, does not understand the nature of this act, nor was he aware of the difference between right and wrong and he is unable to assist his attorney in his defense.

Further there should and ought to be a sanity commission appointed in accordance with the Code of Criminal Procedure, Article 641 et sec for the purpose of a determination of the defendant's competency towards his counsel and his defense.

/s/ James S. Weidner, Jr.
JAMES S. WEIDNER, JR.
TOOLEY, WALDMANN

AND WEIDNER
743 Terry Parkway
Gretna, Louisiana 70053

ORDER

The foregoing motion considered, let a mental examination of the above named defendant be had forthwith, such mental examination to include such tests are are [sic] suggested by such medical experts. Further, let a sanity commission be appointed herein for the purpose of examining and reporting the mental conditions of the defendant, including but not limited to the defendant's competence to assist counsel in his defense and defendant's sanity at the time of the alleged crime.

Let the following doctors be appointed as members to the sanity commission, to wit:

Dr. DeVillier;

Dr. Arneson; and Dr. Frank

Dr. ___

These doctors are to report to this Court on the 5th day of June, 1980, the results of their examination and the findings of their tests and give their opinions.

Gretna, Louisiana, this day of 29th May, 1980.

/s/ Charles Gaudin
JUDGE

PLEASE SERVE:

THE DISTRICT ATTORNEY FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA

Genevieve A. Arneson, M.D., Illegible
1011 FOURTH STREET
GRETNA, LA. 70053

TELEPHONE 367-0919

June 9, 1980

The Honorable Judge Charles Gaudin
Division G
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana

Re: Robert Sawyer

Dear Judge Gaudin:

Following is a psychiatric evaluation on Robert Sawyer, as requested by the Court recently in connection with a Sanity Hearing to be held June 12, 1980. The subject was examined at the Jefferson Parish prison on June 2, 1980.

The subject is a 29 year old Caucasian male resident of Gretna, Louisiana. He is originally from Memphis, Tennessee and has been in the New Orleans area since 1978. He is a widower, his wife was killed in an automobile accident in 1971. He has a 10 year old son who lives back in Tennessee. His occupation he gives as a deckhand working on the Mississippi River. He says he has an 8th grade education, left school at 14 years of age because he had to go to work. He also had a good bit of learning difficulties and was in special education classes. He states that he was hospitalized one time in a psychiatric unit and placed on lithium in 1966. He remained in the hospital for three months. He was told that he was "too active." He states that his mother committed suicide by

gunshot wound when he was three months of age. He was raised by his paternal grandmother.

Subject states he has been in prison for 8 months, arrested 18, 1979, and charged with first degree murder. He states that the individual he is alleged to have murdered did not expire until November 21, 1979. When asked about the charges the subject launched into a long detailed, overly inclusive story about the circumstances leading up to the alleged offense. He claims that he was angry at this woman who was babysitting for his girlfriend's children, after he discovered that she had been giving the children drugs. He also states that at the time of the alleged offense he was inebriated with a cheap wine called "Mad Dog 20-20." He states "that will make you crazy." He states that the events surrounding that time are known to him only in "bits and pieces."

MENTAL STATUS EXAMINATION: The subject presents as a small 29 year old Caucasian male. he is 5 ft. 2 in. tall, weighs 136 lbs. His appearance is marred by a facial defect in the left ocular area and a prosthetic left eye which tears frequently. He has straight black hair, hazel eyes, poor dentition, a slight degree of prognathism. Affect is rather flat as he describes horrendous events in an offhand manner. As noted, he goes into extreme detail, overly inclusive, and has difficulty reaching his goal idea. Thinking is simple and concrete. No evidence of hallucinations or gross delusions at this examination. Intelligences is estimated as low-average or borderline.

PSYCHIATRIC IMPRESSION:

1. No evidence of psychosis. No gross abnormalities in the mental status at this time.

2. Probable sociopathic personality.

3. In my opinion the subject would be considered legally sane and mentally competent to stand trial at this time.

4. From the subject's description he was intoxicated on wine at the time of the alleged offense and therefore it is probable that he has a toxic amnesia for the details of the alleged offense.

5. In the body of the motion to appoint a sanity commission it is mentioned that a brain scan test should be included which would enable medical experts to determine lack of mental capacity or the extent of mental capacity for the following grounds. It should be noted that this type of test would not give the information that is desired.

Sincerely yours,

/s/ Genevieve A. Arneson, M.D.
Genevieve A. Arneson, M.D.

GAA/em

ALBERT B. DEVILLIER, M.D.
2731 CHESTNUT ST.
NEW ORLEANS, LA. 70130

TELEPHONE 899-7164

June 10, 1980

The Honorable Judge Charles Gaudin
Division G
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana 70053

Re: Robert Sawyer

Dear Judge Gaudin:

The following is a psychaitric evaluation on Robert Sawyer as requested by the Courts in connections with a Lunacy Hearing to be held June 12, 1980. The subject was examined at Jefferson Parish prison on June 9, 1980.

The subject is a 29 year old white male who is originally from Memphis, Tennessee. He has been living in the New Orleans area for about 2 years with his common-law wife. He has an 8th grade education and is able to read some and write. His occupation has been working on boats as both a pilot and deckhand. He has been doing this same type of work for the last 14 years. He has never been in the armed services.

The subject states that approximately when he was 16 or 17 years old he took some type of medication for about three months. He had been hospitalized in Memphis, Tennessee. He doesn't know exactly why he was put into the hospital. While he was hospitalized he was put on medication, but he stopped taking the medication after

getting out and hasn't taken any since. He denies ever having seizures or convulsions. He states that he does not abuse drugs, but he has drank heavily for a long period of time. He drinks mostly Scotch. He indicates that his drinking takes place when he is not working.

In regards to the charges, the subject indicates that he is charged with first degree murder. As he indicates "I remember bits and pieces". He stated that he had been drinking all night with his common-law wife and they had left the lounge about 4:30 in the morning. He remembers staggering into the house and the babysitter indicated to him that she had given two of the children some pills to help them sleep. With that he hit her and he indicates that is all he remembers.

MENTAL STATUS EXAMINATION: The subject is a short white male about 5'2" tall weighing 136 pounds. He has very poor dentures. He has an artificial left eye. He indicated that he lost his left eye in 1971 in a car wreck. He denies having any hallucinations or delusions and there is no evidence of any thought disorder. His memory seems to be intact and he has fairly good insight and he is cooperative.

PSYCHIATRIC
IMPRESSION: 1. In my opinion the subject is legally sane in that he knows right from wrong, mentally competent in that he understands the nature of the charges against him and is able to assist counsel in his own defense.

Sincerely yours,

/s/ Albert B. DeVillier, M.D.
Albert B. DeVillier, M.D., Psychiatrist

ABD/el

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[3] PROCEEDINGS

May 29, 1980

MR. BOUDOUSQUE:

We are going to dictate into the record. My name is Phillip Boudousque, I am Assistant District Attorney representing the State of Louisiana in the matter State versus Charles W. Lane and Robert W. Sawyer. This is case Number: 79-2841. We have several motions that are up today at this particular point in time. In response to our motion for inspection and discovery, we are going to dictate for the record what has been supplied to Defense Counsel for their preparation in this matter. These items will be enumerated but it is my impression that both Defense lawyers have been supplied with the complete District Attorney's file and have full and complete access to all the evidence in this case with the exceptions of statements made by State witnesses, not the Defendants in the matter and the Grand Jury transcript which will be supplied to the Court for an in camera inspection to see if it contains any exculpatory material if the Defense lawyers so request. There is one segment of the Grand Jury testimony, the statement of a Detective Gerald Self [4] relating to a statement made by Charles Lane wherein Charles Lane admitted committing a rape of the victim, Fran Arwood, so at this point in time I would like both the Defense lawyers, Jim Weidner and William Noland to dictate or to reach a consensus as to what material they have been supplied. I would also like to put on the record in conjunction with complete and full discovery that any evidence that is presently in the custody of the District Attorney in the evidence locker on the fourth floor of the

Gretna Courthouse will be available for their inspection at any time at their convenience. I don't know all the evidence that is there but any evidence we have in the locker you can go there and see it and you will have no problems with that.

MR. WEIDNER:

In connection with this, to my knowledge the District Attorney has in fact supplied to myself the entire copy of his file with the exception of the articles he stated, a copy of the Grand Jury testimony and actual statements of witnesses.

MR. BOUDOUSQUE:

If I may read for the record that would include additional information I supplied [5] you that is beyond that letters of the Defendant, Robert Sawyer, addressed to Cynthia Shano and dated 10-6-79, 10-7-79, 10-10-79, 10-16-79, 10-17-79, 10-28-79, 11-9-79, 11-13-79, 11-22-79, 12-1-79, 12-7-79, 12-17-79, and 1-7-80. Written statements given by the Defendants, Charles Lane and Robert Sawyer dated 9-28-79, rap sheets of both Defendants, a copy of Robert Sawyer's previous conviction, Gretna Police report, one crime laboratory report Number 1500-79, Orleans Parish Coroner's Report and Autopsy Protocol, West Jefferson Hospital Records beginning 9-28-79, State's answer to Defendant, Robert W. Sawyer's motion for discovery, bill of particulars and motion for production, and State's motion for discovery and inspection.

MR. WEIDNER:

The letter received was a letter sent by Mr. Boudousque to a prior Defense Counsel for the Defendant Robert

Sawyer, Wiley J. Beevers, and it listed matters in the letter and in my review of the file all the matters listed in this letter dated February 13, 1980 were in fact supplied to the Defense.

MR. BOUDOUSQUE:

In addition to that I would like to [6] say we have supplied a fingerprint report from the FBI, a copy of that report has been furnished to both Defense lawyers, the statement of Gerald Self, Detective Gerald Self of Lane's statement when he was rebooked when the Grand Jury was submitted.

MR. WEIDNER:

Both of those articles have been supplied to me and I have been allowed to review photographs which were taken in connection with this matter also although I have not been supplied with copies of the photographs.

MR. BOUDOUSQUE:

This is the Rights of Arrestee that has just been supplied to me (handing document to Counsel).

MR. WEIDNER:

Could you get a copy of those?

MR. BOUDOUSQUE:

Although both the Defense lawyers have seen the photographs the State is going to try to duplicate the copy so they can have their own and if the State is not able to make a duplicate copy the negatives will be supplied to the Defense so they can make their own copies.

They have also been supplied with a list of the [7] evidence.

MR. WEIDNER:

Would you make a statement –

MR. BOUDOUSQUE:

Anything I obtain will be turned over. What I am saying everything I have at this particular time, this particular point in time is going to be in the evidence locker except maybe some burned sheets which you don't have and I might use that. By the end of the week all evidence we have will be filed in the evidence locker and you will have complete and total access to that evidence locker. Now on the bill of particulars – Do you want to make a statement that everything has been dictated so far is true and correct.

MR. NOLAND:

I'm going through it right now.

MR. BOUDOUSQUE:

The photographs of the crime scene itself, crime scene photographs as well as B of I photographs that were taken of each Defendant at the time of arrest as well as certain 8 by 10 and smaller photographs, Polaroid shots of Charles Lane.

MR. NOLAND:

For the record the State has asked me to respond with regards to production of [8] information or production of evidence and I would like to state for the record that referring to the letter dated February 13, 1980

directed to Mr. Wiley J. Beevers I have been handed a packet with items in it which are itemized on that particular letter of February 13, 1980, and for the record I would say that I have in fact received the first four itemized matters thereon, that the fifth matter refers to a Gretna Police report that in fact I have been supplied with a Gretna Police report containing twenty-eight pages, that I have been supplied with number 6 and number 7, number 8 was not in the packet but I have been handed a copy of the West Jefferson Hospital Record beginning 9-28-79 by the District Attorney and I have items 9 and 10. I would at this time state that is the only assertions we would like to make in the record with regards to this matter.

MR. BOUDOUSQUE:

How about the Grand Jury testimony of Gerald Self?

MR. NOLAND:

In addition to that the State of Louisiana has supplied me with a fingerprint report dated February 28, 1980 and a copy of a transcript which purports to [9] be testimony of Detective Gerald Self, pages 95 through 104. For the record, Your Honor, we have also moved for production of photographs and I would like to approach the bench with regard to that particular matter.

(Bench conference between the Court and Counsel.)

MR. WEIDNER:

In the State's motion for discovery and inspection I had filed an answer in the record to the motion and I would like to amend that answer to say that number 3 that at this time I do intend to introduce expert testimony

on the effects of intoxication on an individual that would bear on the Mintz charge but I don't have the definite name of an expert who will do it at this point. I am attempting to have a Doctor Milkey to testify on that point. He is with the Jefferson Parish Substance Center located on Jefferson Highway but at this point he has not agreed to do it.

MR. BOUDOUSQUE:

Also there is a motion for severance filed by Mr. Weidner and as a matter of record the State will say at this point in time both of these trials will be severed [10] and tried differently from Charles Lane, Charles Lane will be severed from Robert Sawyer.

MR. WEIDNER:

There will be other experts to testify to the possible cause of death of the victim.

MR. BOUDOUSQUE:

There may be a fire expert, Gene Hoeltke, and he will be called as an expert as an arson expert.

MR. WEIDNER:

Your Honor, I may also have a fire expert on arson. Who at this point I do not know his name.

MR. BOUDOUSQUE:

I don't have in the record Mr. Weidner's motion for a bill of particulars filed by Mr. Beevers.

MR. WEIDNER:

I have a copy of a motion which was provided to myself by your office and I will adopt his copy and put it into the record.

MR. BOUDOUSQUE:

Not that one. I think that is Mr. Noland's, Mr. Noland's is complete.

MR. WEIDNER:

Your Honor, as the attorney for [11] Robert Sawyer I am adopting the bill of particulars previously filed in this matter.

MR. BOUDOUSQUE:

Your Honor, there are several motions here. There is a motion for an individual voir dire examination filed by Robert W. Sawyer. The State has no opposition to that motion and in fact Mr. Weidner would like an individual voir dire that will be fine. There has been no such motion filed by Mr. Noland so desires the State has no obligations for that either. There is a motion filed by the State to obtain a handwriting specimen which we will pass at the moment because I believe that will be resolved at a later point in time. There is a motion to suppress the evidence as well as the evidence which we will have testimony shortly filed on behalf of Mr. Lane and Mr. Sawyer. There is a motion for discovery and inspection which has been filed by Mr. Noland on behalf of Charles Lane. Are you ready to do that particular motion.

MR. NOLAND:

I am ready to proceed on the motion for discovery and inspection. The Defendant is satisfied with the responses [12] of the State of Louisiana in that regard.

MR. BOUDOUSQUE:

Thank you, Mr. Noland. Then we have a motion for a bill of particulars – Oh there is one motion. Mr. Weidner filed a motion to appoint a sanity commission and order mental observations and tests up to this particular point in time I don't believe the Court has appointed a lunacy commission and if the trial is set for June 23rd and this motion is to be satisfied I think it would be important that that be done to day, Your Honor.

MR. WEIDNER:

Your Honor, I filed the motion and I thought that motion was set for hearing today. The doctors would be present. I was not aware –

MR. BOUDOUSQUE:

The original has not been signed by yourself, Judge.

MR. WEIDNER:

I think the State and the Defense both join in this motion.

MR. NOLAND:

Your Honor, I am going to be filing one additional motion. Everything presently filed I believe with the exclusion of the motion to suppress has been satisfied.

[13] MR. BOUDOUSQUE:

The motion for the bill of particulars is satisfied?

MR. NOLAND:

I will be satisfied with it.

MR. BOUDOUSQUE:

Everything but the motion to suppress the evidence and identification –

MR. NOLAND:

I think I will file a motion for impeaching that may be relevant in this matter.

MR. BOUDOUSQUE:

I don't have any impeaching information because I think that would be exculpatory information but Mr. Weidner asked to see the Grand Jury transcripts which I will not allow them to do but he asked the Court for an in camera inspection and I will give a copy to the Court for an in camera inspection. I will not forward a copy to the Defense lawyers but a copy is available to the Court.

THE COURT:

We are going around in circles. The motion to appoint a sanity commission was filed by you and in your motion Mr. Sawyer does not understand the nature of the charge nor does he understand the [14] differences between right and wrong and is unable to assist his attorney in his defense. Are you telling the Court that is so?

MR. WEIDNER:

What I am saying my discussions with Mr. Sawyer and my observation of him I am not sure and that is why I want to have a sanity commission appointed to examine him.

THE COURT:

What evidence do you have to submit to the Court if that is so?

MR. WEIDNER:

I would like to approach the bench.

(Bench conference between Court and Counsel.)

MR. BOUDOUSQUE:

That leaves us with all motions satisfied. The only thing that needs to be heard in this matter is the motion to suppress the identification, the evidence.

MR. WEIDNER:

The exculpatory, the State has supplied us with everything they have in their file at this point. They supplied me with a copy of the fingerprint report from the FBI on the can of lighter fluid. Were there any other fingerprints [15] attempted to be lifted such as the hammer, was it introduced for fingerprints and if so if there were any taken from it.

MR. BOUDOUSQUE:

You have what I have.

MR. WEIDNER:

To your knowledge you don't know if it was done?

MR. BOUDOUSQUE:

You have everything that was done. To my knowledge there was nothing else dusted for fingerprints. To my knowledge you have everything I have. Like I say if it is not I am not aware of it. There is one other open motion which is the State's motion for all alibi and discovery and inspection from Mr. Noland. I have not received an answer as to that and I have not received an answer to the motion for a handwriting specimen.

MR. WEIDNER:

The Defendant Robert Sawyer has no intention of putting in any alibi Defense so we will have no alibi witnesses we will present. As to the State's motion for a handwriting sample from Mr. Sawyer the Defense has no objections to providing this sample, Your Honor.

MR. BOUDOUSQUE:

[16] Are you willing to stipulate those letters were written by Mr. Sawyers?

MR. WEIDNER:

I can't say that at this point but I will give you a handwriting sample.

MR. BOUDOUSQUE:

I will make arrangements to take the handwriting sample Monday.

M.R. WEIDNER:

I will arrange with the District Attorney to be present with myself and Mr. Sawyer and the expert at the time they take the sample.

MR. BOUDOUSQUE:

Mr. Noland, do you have an answer?

MR. NOLAND:

I do not have a response to the State's motion for discovery and inspection at this time.

MR. BOUDOUSQUE:

Can you give me a response by Monday?

MR. NOLAND:

Sure.

MR. BOUDOUSQUE:

That leaves us with the motion to suppress. We would ask for a sequestration of all witnesses during the course of the motions.

(All witnesses were sequestered.)

[17] MR. BOUDOUSQUE:

I can state for the record there was no physical identification such as a lineup or B of I identification so I don't know what basis there is to suppress identification. Both Mr. Sawyer and Lane were known by all parties concerned and they were arrested on the scene. I call Officer Giroir.

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[608] CYNTHIA SHANO, 928 Porter Street, Gretna, Louisiana, was called as a witness by Counsel for the State and after first being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

MR. BOUDOUSQUE:

Q. Miss Shano, were you in an automobile accident last week?

A. Yes sir I was.

Q. Is that why you have a black eye?

A. Yes sir.

Q. Are you in somewhat of a weakened condition right now?

A. Yes sir.

Q. We will take our time and if at any time you feel you need to stop and take a rest, let us know.

A. Yes sir.

Q. Miss Shano, do you know Robert Sawyer?

A. Yes sir I do.

Q. How do you know Robert Sawyer?

A. We were engaged to be married?

Q. How long did you know Robert Sawyer prior to September 28, 1979?

A. About six or seven months.

Q. Did you live with Robert Sawyer?

A. In Texas I did.

Q. Do you see Robert Sawyer in the courtroom today?

A. Yes sir.

[609] Q. Would you point him out to the jury please.

A. He is to my right in the blue suit jacket.

MR. BOUDOUSQUE:

Your Honor, I would like the record to reflect the identification.

MR. BOUDOUSQUE:

Q. Miss Shano, I will refer your attention to the evening of September 27, the morning and the afternoon of September 28 of 1979. Would you please relate to the jury the facts and circumstances concerning an incident that occurred to Frances Arwood.

A. Starting from the beginning?

Q. From the very beginning. Do you know Frances Arwood?

A. Yes sir I do.

Q. How do you know Frances Arwood?

A. She was my ex-step-sister-in-law. She was married to my step-brother.

Q. Do you have any children?

A. Yes sir I do.

Q. How many children do you have?

A. Two sons.

Q. I show you State's Exhibit-3. Does this photograph accurately depict the condition of Frances prior to September 28, 1979?

A. The face, yes sir.

Q. Did she have any type of disfigurement on her face?

[610] A. No sir she didn't.

Q. State's Exhibit-4, does that photograph accurately depict the facial as well as the physique?

A. Yes sir except she didn't have as much weight. She was on a diet.

Q. Starting from September 27, starting from the beginning tell the jury what you know.

A. It was about 11:30 that morning. Fran had told me to go call my mother which was in the hospital and tell her I would be up there later to see her that I was going to bring her home first so I went and called my mother about a quarter to 12:00. When I talked to her at a pay phone, because we didn't have a phone in that house –

Q. What house are you talking about?

A. My home, 928 Porter Street, Gretna. Okay. I talked to her, I talked to her about 12:00 o'clock. That is when her lunch come. I picked up some cigarettes and got back to the house and it was about ten after noon or

maybe a quarter after 12:00 and I walked in and Bobby had told me to lock the front door and give him the key because we have the bolt locks that you need the key to get in and get out. Fran's mouth was bleeding and I asked what happened and Robert Sawyer said he had hit [611] her. He accused her of giving my youngest son some pills and they were still arguing.

Q. Was there any indication that Fran had given your younger son any pills?

A. None that I know of, no sir.

Q. Continue.

A. All right. She must have told him something because he told her don't smart off to me and he hit her again with a closed fist and she fell back on the bed again and he hit her again and that is when Charles Lane had started hitting her and he had told me to go into the bedroom where the children were and he followed me in there and I could hear Charles Land hitting her from in there and Bobby told me that I had better not call the police because if he went to jail for this, that if he went to jail –

Q. Continue from what you can recall.

A. I can't remember the exact words but he said –

Q. His words to the effect of what?

A. Words to the effect that if he went to jail and if he ever got out Lord help me and then after that he went back into the living room and I followed him in there and he told Fran to go wash her funky whory ass, that nobody wanted to look at her that way. [612] Her funky

whory self, no one wanted to look at her that way and I guess she went to get up again and he took and that's when he kicked her in the back of the head which knocked her back onto the sofa again.

Q. Who is he?

A. Fran.

Q. Who is he who kicked her?

A. Robert Sawyer, with his shoes which he also has taps on the end of the shoes and he took and he drug her by the head of the hair. He was in front of her and I was in back of him and Charles Lane was in back of me and he drug her into the bathroom and started throwing water and he told Charles Lane to watch her to make sure she didn't escape because there is a window busted out in our bathroom with a cardboard in it, that she could have gotten through.

Q. Was she dressed or undressed at the time she went in the bathroom?

A. She had her nightclothes on, her pajamas.

MR. WEIDNER:

I object to the leading.

MR. BOUDOUSQUE:

I asked whether she was dressed or undressed.

THE COURT:

Don't ask leading questions.

[613] THE WITNESS:

All right. I don't know, I guess she didn't want to get in and he knocked her back into the tub and her head –

MR. BOUDOUSQUE:

Q. Excuse me, Cynthia. The jury was not there. When you say he and she, you are going to have to use names, Robert Sawyer, Charles Lane, so they will understand the exact order of events so start from when she was taken into the bathroom.

A. Robert Sawyer had told Charles Lane to make sure that she didn't get out and I don't know, she was drawing the water and I guess she didn't get in fast enough. Fran didn't and that's when Bobby knocked her into the tub, clothes and all but her head hit the wall of the bathroom.

Q. How did he knock her into the bub [sic]?

A. I think he kicked her in. If I'm not mistaken he kicked her into the tub but her head just hit the wall and he took and Charles Lane took her out of the tub an undressed her and she got back into the tub on her own free will. Then the door was closed partially and I was in the kitchen by the sink and Robert Sawyer starting taking and warming some water in my coffeepot.

Q. How long was Charles Lane and Fran in the [614] restroom, the bathroom?

A. Maybe ten, fifteen, twenty minutes.

Q. Was the door open or was the door shut in the kitcher. The bathroom was the door open or shut?

A. I'm pretty sure it was just cracked open a little bit where you couldn't see because there is a dresser that

I keep the towels an [sic] the top drawer and the children's clothes in there and they also have like a little utility cabinet in there. You can put dirty clothes in and they were taking a pretty good while in there and I think Robert Sawyer sort of got mad and he went in there and he took and he poured soap powder over her and then the scalding hot water and Charles Lane started ducking her head under the water and punching her with a closed fist and she was taking – She got out of the tub and I don't know if she went – Fran tried to fight Robert Sawyer back or not but he went into a yell and he come up with both feet and he kicked her and when he kicked her –

Q. Where did he kick her?

A. In the chest. He kicked her back into the tub and her head either hit the window sill or the bathtub itself, not longways but this way in the tub where he [sic] feet were hanging [615] over the side and she never regained consciousness and the whole time I kept telling them to leave her alone, take her out so finally Charles and Robert Sawyer took her out and Charles Lane had her by the feet and Robert Sawyer had her by the head of the hair, face down and they dropped her in between the hall and the kitchen which was right there by the refrigerator. Robert Sawyer then started walking on her back and Charles Lane was kicking her in the ribs and Robert Sawyer started beating her with a belt, a leather western belt he had. It was black. I told them again to leave her alone. They put her back on the sofa-bed and I had covered her up. Her legs were closed and I was having diarrhea then and I was coming down with the flu.

Q. Excuse me, who placed her on the sofa-bed?

A. Robert Sawyer and Charles Lane.

Q. And was she placed on her back or on her stomach?

A. On her back.

Q. Was she dressed or undressed at that point?

A. She was undressed.

Q. You say you covered her up?

A. I covered her up.

Q. You say her legs were closed?

A. They were closed.

Q. Are you sure of that fact?

A. Yes sir I am.

Q. Then what did you do?

A. All right, that's when I went to the bathroom.

Q. Why?

A. I was having diarrhea at the time. I was coming down with the flu and I heard Robert Sawyer say to the effect I can show you how cruel I can be and then I didn't hear too much of anything else after that. I came out of the bathroom and I smelled something like burning and I asked them what it was and they were laughing and her legs were open when I come out of the bathroom.

Q. Did you see her face when you come out of the bathroom. Did you see the body?

A. I did not see her body because it was covered back up again.

Q. Did you see her face?

A. Not really. I was mostly concerned about the smell in the house and them laughing but I did see it afterwards when Charles Land said -

Q. Continue form the point when they were laughing. Who was laughing?

A. Robert Sawyer and Charles Lane.

Q. When they were laughing where were they in the house?

[617] A. They were in the kitchen at the kitchen table which is right there by the living room.

Q. What were they laughing about?

A. They were laughing because what they had told me Charles Lane said Robert Sawyer didn't have to take and set her on fire with him in her and that's when Robert Sawyer got up and said don't nobody told you to stay inside of her while I told you I would show you how hot pussy can get. That's when her face was all burned up and he had poured scalding hot water over her.

Q. When did he pour the scalding hot water over her?

A. It was after the incidents of the weird smell in the house.

Q. Okay, after you came out of the restroom?

A. Yes sir.

Q. That night on that day I should say on how many occasions did Robert Sawyer pour scalding water over Frances Arwood?

A. Twice. Once in the bathroom and once in the living room and when she was in the bathroom he tried pouring water over her to revive her to make her become conscious again but she never did.

Q. Cynthia, I am going to show you some photographs. I show you State's Exhibit-5. Can you identify that photograph?

[618] A. That is my ex-step-sister-in-law.

Q. Without the medical apparatus, does that depict the condition she was in after she was beaten and set afire by Robert Sawyer and Charles Lane?

A. Yes sir but she didn't have the blisters on her.

Q. State's Exhibit-6.

A. Again this is it but still she didn't have the blisters on her then either.

Q. State's Exhibit-7, do you know what that is?

A. That is her arm but I never got to see because it was under the covers.

Q. State's Exhibit-9.

A. That's her hand but again it was under the covers too.

Q. And State's Exhibit-8.

A. That's her legs but again it was under the covers.

MR. BOUDOUSQUE:

Your Honor, these photographs have already been introduced into evidence and at this point in time I would like permission to show these photographs to the jury.

MR. WEIDNER:

Which photographs?

MR. BOUDOUSQUE:

Five, 6, 7, 8, and 9.

MR. WEIDNER:

I don't believe they have been offered yet.

MR. BOUDOUSQUE:

Have they been offered and accepted into evidence?

THE COURT:

Yes.

MR. WEIDNER:

I would like to note my objection for the record again.

THE COURT:

The record contains your objection.

(The jury examines the exhibits.)

MR. BOUDOUSQUE:

Q. Cynthia, I'm going to show you State's Exhibit-10. Can you identify that photograph?

A. Yes sir, that is the alley part of my house.

Q. State Exhibit-11, can you identify that photograph?

A. Yes sir, that is the front porch leading through the front of the house.

Q. Who is this in the photograph?

A. That's me and the reason why I was in it because I had a messed up foot which was cocked up.

Q. State Exhibit-12, can you identify that photograph?

A. That's my mother's living room.

Q. And what is this a picture of?

[620] A. Which one, the whole thing here, that's a sofa-bed, our sofa opened up into a bed.

Q. Is that the sofa-bed you were speaking in reference to?

A. Yes sir.

Q. What type of sheets did the sofa-bed have on it?

A. If I'm not mistaken it was a fitted sheet.

Q. I show you State's Exhibit- 15 and 16. Can you identify those photographs?

A. Yes sir, that is still the living room sofa.

Q. Do you see these things on the sheets?

A. Yes sir.

Q. What is that?

A. Burn marks.

Q. Did those sheets have any burn marks prior to September 28, 1979?

A. These were brand new sheets that I had bought myself and I have been looking for them.

Q. I show you State's Exhibit-13. Can you identify this photograph?

A. That is the mattress on the sofa-bed in the living room.

Q. Does that photograph accurately depict the condition of the mattress after September 28 of 1979?

A. Afterwards but it wasn't like that before then.

Q. Describe that mattress prior to this incident.

A. Prior to it it was brand new mattress.

Q. Do you know what this red stuff all over that [621] mattress?

A. That is blood.

Q. Was that blood there prior to this incident?

A. No sir. It was a brand new mattress.

Q. These photographs accurately depict the condition of your sheets after the incident on that date?

A. After the incident but not before the incident.

Q. I show you State's Exhibit-19. Can you identify that photograph?

A. That is the kitchen table. The belt she was beat with and the MD 20/20 they were drinking. That is a soup tureen or a cookie jar, the washing machine and the sink.

Q. State's Exhibit-20. Can you identify that photograph?

A. That is our kitchen chair with my coffeepot on it.

Q. State's Exhibit-21, what is that a photograph of?

A. Part of the kitchen by the ice box and half of the hall where her feet was, and her face and it had blood stains.

Q. Is that a blood stain?

A. That's a blood stain because there is no stain on out kitchen floor by the ice box.

Q. Do you state that is where Frances was dropped?

A. Yes sir.

[622] Q. Where was her face?

A. Right her [sic] (indicating).

Q. Where was the other portion of her body?

A. It started in here and up in here because she was kind of tall.

Q. What kind of floor is that?

A. I don't know. My mother bought it after my father died which will be eleven years and it is a non-wax floor.

Q. Did it have any cushion or padding?

A. I don't really remember.

Q. State's Exhibit-14.

A. That is the living room again. The mattress, that is the kitchen and the records, Robert Sawyer was playing the whole time.

Q. You say he was playing records the whole time. Describe what he was doing in that action?

A. Robert Sawyer from what I remember from the time I was with him can think better and he has always told me he can get his mind working listening to music, music helps him think better.

Q. Was he listening to music that day?

A. Yes sir.

Q. From what time to what time do you recall?

A. From about 8:30, 9:00 o'clock until he was arrested.

Q. What was he listening to?

A. Mostly Elvis music except for this one here. [623] It was an old album that is on here now. We have still got it and I cannot remember because it is my mother's record and it is a real old one.

Q. Was it one record or many different records?

A. This is one album.

Q. Did he listen to one record or many different records?

A. Many different ones, mostly Elvis because he is an Elvis fan.

Q. How were those records changed?

A. He changed them himself.

Q. Was anyone operating that music box besides Robert Sawyer?

A. No sir.

Q. State's Exhibit-23.

A. That is the bathtub.

Q. Do you see this red portion of this tub here?

A. Yes sir.

Q. Was that in the tub prior to the incident in question?

A. None of it was except for the frogs in there.

Q. What is that?

A. This is blood. This is coffee grounds from the coffeepot.

Q. And when were the coffee grounds from the coffeepot placed in the tub?

A. I don't know exactly when the coffee grounds were put in the tub.

[624] Q. State's Exhibit-24. Can you identify that photograph and if so how?

A. That is my old stereo. That is not working because it needs a needle and that is my mother's ivy

plant which is dead and that is Robert Sawyer's Bible which we have got in Nederland, that's my Bible, his Bible, these are Oral Robert's little Bibles. They were sent to my mother and this is my father's Bible and this is the Bible if I can remember correctly that Robert Sawyer and I had gave to my mother and that is a hammer and these are records.

Q. Whose hammer is that?

A. The man that used to live across the street from the house.

Q. During the course of this incident who was in your house?

A. This incident. As far as I know Robert Sawyer, Charles Land and Frances Arwood.

Q. Where were your children?

A. And my two children.

Q. How old are your children now. How old were they on September 28?

A. All right, my youngest son was two and my oldest son was four.

Q. Where were they during the course of this crime?

A. They were in a bedroom but apparently somehow [625] or another my four year old saw a few things of what happened. That's how I found out Robert Sawyer

MR. WEIDNER:

Objection, Your Honor.

THE COURT:

Ask another question.

MR. BOUDOUSQUE:

You can't repeat what you know from another source, Cynthia. You can only repeat what you know from what you saw or from what you observed.

MR. WEIDNER:

Your Honor, would you explain the rule of hearsay to a witness please.

THE COURT:

There are forty exceptions or there-abouts to the hearsay rule, Mr. Weidner.

MR. WEIDNER:

The general rule we can argue.

THE COURT:

The general rule is that you cannot say what somebody else told you but there are many exceptions to that rule so I will proceed and you can object, Mr. Weidner at an appropriate time.

MR. BOUDOUSQUE:

Q. Were your children asleep or were they awake?

A. During the incident they were awake.

[626] Q. And where were they?

A. They were in the front bedroom.

Q. Were they in the front bedroom the entire time?

A. As far as I know except when my oldest son had to go to the bathroom.

Q. Did you ever go in the front bedroom?

A. Yes sir I did.

Q. Why did you go in the front bedroom?

A. Because Robert Sawyer told me to go in there.

Q. And why did he tell you to go in there?

A. After all of that had happened with him hitting Frances and everything he told me to go into the bedroom and that's when he followed me and I heard Charles Lane – See, we have two bedrooms, the front and the back bedroom. The back bedroom was my bedroom at that time but it is switched now.

Q. You stated that in your testimony that Robert Sawyer told Charles Lane to watch Frances Arwood in the bathroom, correct?

A. Yes sir so she didn't get out.

Q. I show you State's Exhibit-22. Is there anyway she could have gotten out of this bathroom?

A. Yes. Right here you can see a part of the cardboard. The boy that used to live next door busted it out with a football and I nailed a cardboard up there. You can see part of it.

[627] Q. After they were laughing what was said. While they were laughing what was said. Did either Charles Lane or Robert Sawyer speak to you?

A. They had told me what had happened.

Q. What did they say?

A. That Robert Sawyer had taken and set Fran on fire with Charles Lane inside of her and Robert Sawyer got up and said nobody told you to stay inside of her when I told you how I could show you how hot pussy can get.

Q. What happened after that, Cynthia?

A. Charles Lane went and laid on the sofa-bed. Frances' head was to the foot of the sofa-bed. Charles Lane went and laid next to her with his head at the head of the sofa-bed. Robert Sawyer then told me to go pack his clothes which were already packed because he had just followed me down from Texas because I came down here by myself in an eighteen wheeler.

Q. Did he tell you why he wanted you to pack his clothes?

A. He was going to leave.

Q. Did he say where he was going to go?

A. No sir he didn't but he wanted to take my youngest son with him.

Q. Okay, then what happened?

[628] A. I went in there and I tried to get out of my bedroom window. The window was also busted out and

my oldest son said "Momma, why are you trying to climb out the window when you can go out the front door." Robert Sawyer had the keys to that front door. He came in there and that's when he hit me up side the neck and that's when he made me go back into the living room. About a few minutes after that, maybe fifteen minutes after that there was a knock at the front door.

Q. Was there any discussion as to what should be done with Frances Arwood?

A. Charles Lane wanted to take and dump her off in Buras or Venice or somewhere like that. I don't really know. It was some place he was working at on the boat. Robert Sawyer said he didn't have enough gas to make the trip.

Q. Do you know what happened, continue from that point if you would from when he said he did not have enough gas to make the trip.

A. That's when Charles Lane went and laid next to her. He was still playing records.

Q. Who was?

A. Robert Sawyer and he was sitting with his legs crossed Indian style like and he was listening to the records and that's when [629] he told me to go pack his clothes and to make sure I didn't try to get away but I tried getting out of the window because I feared for my life and my children's lives and that's when my son said what he did and I got hit up side the neck.

Q. By whom?

A. Robert Sawyer.

Q. Why did he hit you up side the neck?

A. Because I tried to escape and that's when I was brought back into the kitchen and there was a knock at the front door and he wasn't going to let me open it until he heard my little nephew holler to my sister and my little nephew was fixing to kick the door in because he knew somebody was there. That's when Robert Sawyer decided to give me the keys to the door and told me not to open it out and not to go out and make sure I got rid of them when I got the door opened. When I got the door open a crack enough for me to fit through I made sure Robert Sawyer or Charles Lane wasn't in reach of me and I ran. That's when my sister took and she stood in between the door and she had dared Charles Lane or Robert Sawyer to move, to go out that front door.

Q. What did you do at that point?

[630] A. I went across the street and I called the police and the emergency unit.

Q. Describe what happened then.

A. I was pretty well in hysterics by then. The emergency unit beat the policemen there but I don't think they could go in with-out the police being there and Robert Sawyer and Charles Lane were taken out of the house handcuffed and put in a police car. One police car was sitting in my mother's yard which Charles Lane was put in and one was on the curb a little further than the driveway which Robert Sawyer was put in and they were, I guess they were brought to be booked and I had to give a statement.

Q. Did you give a statement?

A. Yes sir I did.

Q. Who did you give a statement to?

A. I can't remember his name or pronounce it right now. Detective Geiling?

Q. I show you State's Exhibit-25, a Xerox copy. I ask you to look through these documents and see if you can make an identification of that report. Are you able to read right now?

A. My vision is very blurred.

Q. Do you understand –

A. I can read it. That's why I have it pretty [631] close up.

Q. Is that your signature, Cynthia?

A. Yes sir. It's pretty shaky but it is it.

Q. Is this your signature here?

A. Yes sir.

Q. At the end of this page?

A. Yes sir.

Q. At the end of this page.

A. Yes sir.

Q. Are these your initials CAS?

A. Yes sir.

Q. Did you put those there?

A. Yes sir.

Q. And here?

A. Yes sir.

Q. And here?

A. Yes sir. I only wrote the signature where a mistake was made.

Q. Would you read from here on to the end. (Opposing Counsel examines document.)

MR. BOUDOUSQUE:

Q. Would you read from where it says right here, speak into the microphone, Cynthia.

A. Earlier today –

MR. WEIDNER:

She has already testified as to all the facts contained in the statement. I would suggest we have copies of it made and distribute it to the jurors and let [632] them read.

MR. BOUDOUSQUE:

I think I have the option of how I can prosecute my own case. Would you please read the st ment.

THE. WITNESS:

Earlier today, I think it was around noontime, I left my house to go use a phone to call my mother who is in the hospital. I drove to Franklin Avenue, and used the pay phone. When I left the house, Fran was sitting on the sofa-bed in the living room, and Bobby Sawyer my boyfriend was playing records, and this other guy who I

know only as Chuck was sitting on the side of the sofa-bed. My two children Wayne age four and Troy age two were in the bedroom playing. I stayed gone about fifteen minutes and when I got back home I saw Fran sitting on the side of the sofa-bed and her mouth was bleeding. Bobby and Chuck were arguing with Fran, and she was arguing back. They were arguing because Fran had given some pills to my son the day before. Bobby told Fran to quit smarting off to him, and then he punched Fran in the face. Fran fell on the sofa-bed, and Bobby punched her again. The other guy Chuck then [633] punched Fran, also in the face. After that Fran got up, sitting on the sofa-bed and Bobby kicked Fran in the head knocking her back over. Bobby then began punching Fran in the chest. Bobby told me to go on the other side of the house. I was scared so I went to the bedroom. Bobby came into the bedroom with me. Bobby told me I better keep my mouth shut about this, and that if he went to jail for this I better watch out when he got out. When I was in the bedroom I could hear the other guy Chuck hitting Fran. Bobby then went back into the living room, and I followed, when we got back into the living room I saw Fran lying on the sofa-bed and Chuck was also on the sofa-bed. Fran was all full of blood. Bobby told Fran to go "clean her whory, dirty, funky ass." She would not go to the bathroom, so Bobby kicked her in the chest. Bobby then drug Fran by the hair and took her to the bathroom. I was in front of them, and Chuck followed them. Fran started drawing water in the tub, and the guy Chuck was sitting on the toilet. Fran would not get into the tub so Bobby kicked her into the tub with her clothes on. When she fell into the tub her head hit the wall. Chuck [634] pulled Fran out

of the tub aand [sic] took her clothes off of her. Fran then got back into the tub on her own. When Fran was in the tub Bobby started heating water in the coffeepot. When Fran would not get out the tub, Bobby took the hot coffeepot of water and poured it over Fran's head. Bobby then went and got some soap powder and poured it over Fran's head. The guy Chuck kept ducking [sic] her head under the water and he kept punching her. B by then grabbed Fran by the head of the hair and pulled her out of the bathtub. Fran got up and must have drew her fist or something because Bobby kicked her in the chest and she fell back into the tub. Bobby told her to get out of the tub, and when she didn't move he got a pot of cold water and threw it on her. I told Bobby to leave her alone, I had been telling them to leave her alone, but they would not stop. I told them to get her out of the bathtub so Bobby again pulled her by the head of the hair and pulled her out the tub and onto the floor. Fran was face down and Bobby walked on top of her. Chuck then began kicking her in the ribs. I kept telling them to leave her alone and pick her up. Finally Bobby picked her up [635] by the head, and Chuck grabbed her feet. They carried her on the sofa-bed in the living room. One of them, I don't know exactly know which one got scalding water from the coffeepot and poured on Fran. I was in the bathroom at this time and I cold hear them and I heard Bobby tell Chuck I'll show you how cruel I can be. When I got out of the bathroom, I walked into the living room. Bobby and Chuck were sitting at the kitchen table. Fran was lying on the sofa-bed she was passed out. I could smell something burning, but I could not figure out what it was. Bobby made me sit down at the table Chuck told me that Bobby

set them on fire, and he said that Bobby did not have to set him on fire with her. Bobby told Chuck he should not have stayed in her when he told him that he would show him how hot pussy could get. That's when Bobby told me that he set them on fire with the lighter fluid. Chuck then went into the living room and layed down on the sofa bed next to Fran and went to sleep. Bobby told me to go pack his clothes. He then hit me on the neck. I went into the bedroom to go pack his clothes. When I was in the bedroom I heard someone knocking [636] on the door outside. Bobby wasn't going to let me answer it. He heard that it was my nephew Tommy. He told me to go outside and get rid of him. When I opened the door I saw my sister Sylvia in the car. I ran to my sister and told her to help me, I told her that Bobby and the other guy had beaten Fran up. I then went across the street and used a neighbor's phone and called the police and a little later that's when the police came. Question: Did you see either Bobby or Chuck strike Fran with any objects. Answer: No I only saw the [sic] punch her and kick her and pour the hot water on her. Question: Did anyone have sexual intercourse with Fran during the time period that you observed Bobby and Chuck beat on her. Answer: Not that I saw, but I heard Chuck say "I was fucking her when Bobby put her on fire." Question: How long have you known Bobby Sawyer. Answer: Going on six months. He's been living with me for almost six months. We were supposed to get married. Question: How long have you known the guy you call Chuck. Answer: I just met him this morning when Bobby brought him home. Question: How long have you known Fran. Answer: I've [637] known her for a few years, she has been staying with me

since Monday night. Question: Is there anything you wish to add to this statement at this time. Answer: No. End of statement.

MR. BOUDOUSQUE:

Q. How long after the police arrived at your residence did you give this statement to the Gretna police?

A. Not too long afterwards. I don't remember.

Q. Describe your mental and emotional and physical state.

A. I was pretty well much in hysterics really.

Q. What type of belt did Robert Sawyer use when he was beating Fran?

A. It was a black leather western belt. It's in one of the pictures.

Q. I show you State's Exhibit-19. Do you see a photograph of that belt?

A. Yes sir. It is right here. The western buckle on it. The western belt. He bought it at Sears and Roebuck.

Q. When was that belt used?

A. When he beat Fran that morning on the rear.

Q. And at what point in the incident was this. At what point in time during the incident was that.

A. That was after he had taken her out of the tub and dropped her in between the hall and by [638] the ice box to the kitchen.

Q. Did you and Bobby go out the night before?

A. For a while I went out with him, yes sir.

Q. Did you go out alone or was anyone with you?

A. We went by ourselves.

Q. Who was at your house when you left

A. Frances Arwood and my two children, Wayne and Troy.

Q. When is the first time that you met Charles Lane?

A. That morning of the incident.

Q. Did you know him at any time prior to the incident?

A. No sir I didn't.

Q. Where did you go with Bobby Sawyer?

A. First we went on Fourth Street in Harvey with what they call Sammy's Lounge to see a friend of his. We had a couple of swallows of MD 20/20. From there we went to the Hourglass which is on the service road and the Expressway in Gretna and not too far from my house.

Q. Did you see if he had any drinks at the Hourglass?

A. Who?

Q. Robert Sawyer.

A. Yes sir. He was drinking pretty heavy hard liquor.

Q. Do you know how much alcohol he had consumed?

[639] A. Not really, no sir.

Q. Did Robert Sawyer at any time on the 27th or the 28th appear to be incoherent to you?

A. No sir. He can get to drinking a lot and still walk a straight line and still know what is going on.

Q. You have been around Robert Sawyer when he was drinking a lot?

A. Yes sir, in Texas.

Q. Does he handle his alcohol fairly well?

A. Pretty good but he has a temper.

Q. He has a temper?

A. He has a temper when he's drinking and listening to his music.

Q. What do you mean he has a temper?

A. He gets mad over any old thing. You look at him cross ways when he's drinking and he gets mad.

Q. Do you know how much alcohol he consumed at the Hourglass?

A. Not really, no sir I don't.

Q. What happened after you left the Hourglass?

A. I went home.

Q. And pick it up from when you went home, when is the next time you saw the Defendant?

A. It was anywhere between 7:30 and 8:30 the next morning.

Q. And who was with him?

A. Charles Lane.

[640] Q. Did they have any type of alcohol with them?

A. MD 20/20.

Q. Do you recall how many bottles of MD 20/20 they had?

A. They had three.

Q. Do you recall how many bottles they had drank from the time they got to your residence until the time the police arrived?

A. They had done killed two bottles of it and I think it was either a half or a little over half of the third one.

Q. Was the Defendant staggering?

A. No sir he wasn't.

Q. Was he slurring his speech in any form or fashion?

A. No sir.

MR. STEPHENS:

Your Honor, I object to the continuing leading nature of the District Attorney's questions. This has been going on since this witness has been on the stand.

MR. BOUDOUSQUE:

I will rephrase the question.

MR. BOUDOUSQUE:

Q. Did he give you any indications whatsoever that he was incoherent?

MR. STEPHENS:

Your Honor, I raise the same objection again to that question.

[641] THE COURT:

The Court overrules that.

MR. BOUDOUSQUE:

Q. Did he give you any indication whatsoever that he was incoherent and did not understand the events that were going on around him?

A. No sir. He knew pretty well what he was doing.

Q. Why do you say that?

A. Because Robert Sawyer can drink a whole lot and when he listens to his music it makes him think that much more and the more he listens to it, to a certain song especially by Elvis he gets mad.

Q. Okay, describe in the conversations that you had with the Defendant as well as the conversation the Defendant had with Charles Lane, not what was said but describe the manner of his speech. Was it coherent. Was it incoherent. Was his speech slurred or did he have a thick tongue or anything like that when he was talking to you.

A. No sir.

Q. Describe his speech the best way possible.

A. The speech was normal. If he would talk now it would be the same way.

Q. Did you see his walk. Did you see his physical coordination?

A. Yes sir. He could walk a straight line.

Q. Did he appear to be physically coordinated to [642] you?

A. No sir. He wasn't staggering or bumping into anything or anything like that.

Q. After this incident, did you receive any correspondences from the Defendant?

A. Yes sir. I received phone calls after. First he was calling me at my sister's house because we didn't have a phone and my mother got a phone put in and he got it from the operator. He was calling and he had this Robert Hicks in jail with him calling and his sister and brother-in-law were calling me and the last time his sister and brother-in-law called me they threatened me and he wrote letters.

MR. WEIDNER:

I object to this. I believe also the jury should be removed so we can go into the prior discussions.

MR. BOUDOUSQUE:

I will not go into the contents of the letters. I will introduce them in globo.

MR. WEIDNER:

That is why I think we should remove the jury because of our prior discussions.

THE COURT:

I think the prior discussions centered around the Court's reading the [643] letters before they were submitted to the jury.

MR. BOUDOUSQUE:

I will offer them in globo.

MR. BOUDOUSQUE:

Q. Cynthia, before the instructions, I believe we were at the point where you stated you received some letters from the Defendant.

A. Yes sir.

Q. I will show you State's Exhibit-27 which has been marked in globo. Would you briefly look through these correspondences and see if these are the letters that were written to you by the Defendant. You don't have to read each one.

A. I recognize the handwriting.

Q. Whose handwriting is that?

A. Robert Sawyer.

Q. What were your feelings toward Robert Sawyer after this incident?

A. I was still in love with him and it took me a while to get over him but I did it.

Q. Did you write back to the Defendant?

A. Yes sir I did.

Q. On how many occasions?

A. I don't remember how many letters I wrote.

MR. BOUDOUSQUE:

Mr. Weidner, do you have a copy of those letters?

[644] MR. WEIDNER:

I have the originals.

MR. BOUDOUSQUE:

Q. The letters you reviewed so far were all written to you by Robert Sawyer?

MR. WEIDNER:

I will state that is all the letters there are, there are also some other letters over there but they are letters written by Robert's sister to him.

MR. BOUDOUSQUE:

Your Honor, for purposes of identification I'll mark these letters as State's Exhibit-26 in globo. I am sure Mr. Weidner will use them and have a Defense number also.

MR. BOUDOUSQUE:

Q. Cynthia, you said you wrote back to Robert Sawyer.

A. Yes sir.

Q. I ask that you look through those letters.

A. That is my handwriting.

Q. Did you speak with Robert Sawyer after this incident?

A. Yes sir.

Q. Did he speak to you?

A. Yes sir.

Q. What was the nature of the conversations?

A. He kept telling me that I was the only one that [645] could help him out of this. It was all in my hands.

Q. Is that the basic itinerary of the letter that were written. The letters that were written to you by Robert Sawyer. Is that basically what those letters state?

A. On there. Not really except there that I did tell him that scalding hot water was poured on Fran and all.

Q. What else did you talk about with him?

A. In the letters?

Q. At any time, the letters as well.

A. Telephone?

Q. Uh-huh.

A. Well telephone conversations were mostly like everything was in my hands, whether he went to jail or got the death penalty or anything. He put it all in my hands as he said it. I was the only one that could help him and like I tried to explain to him I couldn't really help him when I talked to him over the phone.

Q. What do you mean?

A. Not by trying to get up and sit here and lie and say well no he didn't do it. I would be lying, but I was still in love with him and I worshipped him even though

I had left him in Texas because he tried keeping me away from my family and my mother was [646] all I had left and that wasn't going to get it and that is when I left him and I come down here by myself with my two children and he was in Texas and he followed me two days later down here.

Q. About what time did you finally get over the emotional feelings you had for the Defendant. What time did you finally get over your emotional feelings you had for the Defendant?

A. It was I think just before Christmas or a little after Christmas.

Q. What did it take for you to get over the feelings you had for the Defendant?

A. I finally got my head together because after the incident happened I wanted to try and block everything out of my mind that had happened and I found out I could not do it and I started putting the pieces together and I realized what he had really done.

MR. BOUDOUSQUE:

I have no further questions.

MR. WEIDNER:

At this time I believe the Court had agreed to let Miss Shano take a break before we begin the cross examination.

THE COURT:

If you wish to break I certainly will.

[647] THE WITNESS:

I need a rest. I am weak.

THE COURT:

We will recess for ten minutes.

(The jury was removed at 11:40 a.m. Reconvened at 12:00 noon. Polling of the jury was waived by both the State and the Defense.)

CROSS EXAMINATION

MR. WEIDNER:

Q. Miss Shano, my name is Jim Weidner and I represent Robert Sawyer.

A. Yes sir.

Q. Miss Shano, I believe in your testimony to the District Attorney you said the night before this incident occurred that you and Robert had gone out.

A. Yes sir.

Q. The first place you went to was a place called Sammy's Bar?

A. We didn't go in.

Q. I realize you didn't go in but you went to Sammy's Bar first.

A. Right.

Q. At Sammy's Bar Robert was drinking MD 20/20 wine?

A. With some guy there. I don't remember his name. He tried to borrow some money from him.

Q. But he was drinking MD 20/20 wine?

[648] A. Yes sir he was.

Q. Approximately how long were you at Sammy's Bar?

A. About ten or fifteen minutes and that was it.

Q. Did you see how many drinks of wine Robert had at Sammy's Bar?

A. He took two or three swallows out of the bottle itself from this guy that had it.

Q. One of those big bottles, quart bottles?

A. They only come in one size as far as I know.

Q. When you left Sammy's Bar you went to the Hourglass Lounge?

A. Yes sir.

Q. You testified that Robert was drinking heavily at the Hourglass Lounge.

A. He was drinking some kind of whiskey. He was drinking beer and then he switched to whiskey straight.

Q. Do you know how many beers Robert had drank at this other lounge?

A. No I don't remember.

Q. Plenty?

A. I just didn't keep track because he was mostly drinking and shooting pool.

Q. But he drank so much beer you couldn't keep track of it?

MR. BOUDOUSQUE:

Objection, Your Honor. That question said he was drinking so much beer she couldn't keep track.

[649] THE COURT:

Would you repeat your answer?

THE WITNESS:

I just didn't count how many he drank.

MR. WEIDNER:

Q. But it was plenty.

A. I really don't know.

Q. At what point did he switch and begin drinking whiskey?

A. After I think maybe two or three beers, maybe. He started with whiskey.

Q. Do you remember or do you know how much whiskey he was drinking?

A. I didn't keep track because I don't keep track of people that drink because I don't drink.

Q. How much was he drinking. Was it whiskey in a mixed drink or was he drinking it straight?

A. Straight.

Q. In a little shot glass?

A. I don't remember if he had a shot glass or not.

Q. You said you don't remember how much whiskey he drank?

A. Right.

Q. Approximately how long were you with him at the Hourglass Lounge?

A. All I know I was there up until in between 12:00, 12:30, 1:00 o'clock or 1:30.

Q. In the morning?

A. Right. I went back home.

[650] Q. And Robert drank continually the whole time you were with him?

A. Except when he was shooting pool.

Q. When you left the Hourglass Lounge was Robert drunk?

A. No he wasn't drunk.

Q. What makes you think he wasn't drunk?

A. Because he doesn't get drunk that easily. He can handle his liquor.

Q. What time would you say you arrived at the Hourglass Lounge?

A. That I don't know.

Q. Do you remember what time you left your home that evening?

A. Approximately between 6:30 and maybe 7:00 or 7:30 we left the house, my house.

Q. And you went from your house directly to Sammy's?

A. Right.

Q. So you were at Sammy's I believe you said fifteen minutes?

A. About ten or fifteen minutes in the parking lot. He was talking to this guy.

Q. You arrived at the Hourglass Lounge somewhere around 8:00 o'clock?

A. Maybe 8:00, 8:30, 9:00 o'clock. I don't remember the time.

Q. And until 1:00 or 1:30 in the morning when you left the Hourglass Lounge, Robert drank [651] either beer or whiskey continuously. He always had a drink when he played pool or do other things.

A. After I left I don't know what he drank.

Q. I'm talking about when you were there with him.

A. He was drinking.

Q. Miss Shano, in connection with this case you have discussed it with the District Attorney, haven't you?

A. Sir?

Q. You have discussed this case and your testimony with the District Attorney.

A. Day before yesterday, or night before last, that evening.

Q. You have discussed it on other occasions, haven't you?

A. Not since Charles Lane's trial, no sir.

Q. Until the night before last, the day before yesterday.

A. That's the first time since Charles Lane's trial.

Q. Miss Shano, at anytime isn't it true that in fact you didn't leave the Hourglass Lounge that night and go home. You stayed with Robert Sawyer all night, didn't you?

A. No sir I did not.

Q. And that you and Robert Sawyer met Charles Lane at the Hourglass Lounge.

A. No sir I did not meet Charles Lane there.

[652] Q. You all stayed out together all night.

A. No sir we didn't.

Q. And that approximately between 7:00 and 7:30 in the morning, yourself, Robert Sawyer and Charles Lane arrived back at your home at 928 Porter Street.

A. I didn't, no sir.

Q. Do you know Doris Vicknair?

A. Yes sir I do. She lives across the street from my mother's house.

Q. Then you are aware that Doris Vicknair saw you.

MR. BOUDOUSQUE:

Objection, Your Honor, on the grounds is you want to bring what she is aware of with Miss Vicknair or may not

testify to the proper basis would be Mrs. Vicknair herself and not whether or not she is aware of fact that is not in evidence yet.

THE COURT:

What is the question?

MR. WEIDNER:

Q. The question is that Doris Vicknair saw her, Charles Lane and Robert Sawyer arrive home together at approximately 7:00 to 7:30 in the morning.

A. That is what she said but we haven't been on talking terms for a few years. She had just moved on our street. She used to live on the corner which is Hancock Street [653] and we haven't gotten along. She always is getting a hold of my children and everything.

Q. Do you know Doris Hebert?

A. Doris Hebert. I don't know a Doris Hebert.

Q. Lives at 930 Porter Street.

A. 930. I don't know of a Doris Hebert, no sir.

Q. Then you couldn't be aware that Doris Hebert also saw you arrive home at that time.

MR. BOUDOUSQUE:

Objection. If she doesn't know Mrs. Hebert how can she be aware of anything Mrs. Hebert may or may not have said and that question is a way to get in front of the jury a question which should not be asked.

THE COURT:

Are you calling her as a witness?

MR. WEIDNER:

Yes sir.

THE WITNESS:

I don't recall a Doris Hebert living on our street. Only a Doris Vicknair.

MR. WEIDNER:

Q. In fact Doris Vicknair is the woman's home that you went to phone the police the day this incident occurred, isn't it?

A. Yes sir but she is a Vicknair.

Q. You remember speaking to police officers or [654] detectives the day the incident occurred?

A. Over at B. H. Miller's office, the Sheriff's office on Fifth Street, yes sir.

Q. Are you good friends with B. H. Miller?

A. Not me.

Q. Who is?

A. My mother and my sister and them are.

Q. Do you remember making a statement that B. H. Miller was going to fix this for you?

A. Going to fix it for me. I don't remember making a statement that he was going to fix it, no sir.

Q. What statement did you make?

MR. BOUDOUSQUE:

Objection, Your Honor. That question is immaterial, improper, and a proper foundation has not been laid for that question. She made various statements at many different times and unless Mr. Weidner would care to be more specific as to what statement at what time and to whom I would object to that question.

MR. WEIDNER:

I withdraw the question.

MR. WEIDNER:

Q. Do you know an Officer Neal Giroir, Gretna Police Department?

A. I'm pretty sure I do, if he had a broken arm at one time, yes sir.

[655] Q. That is Neal Giroir. Do you remember him being present on the scene the day this happened?

A. I don't remember the day it happened who all was on that scene, the officers.

Q. You remember speaking to policemen before you were brought to the police station. Do you remember speaking to a policeman?

A. I remember speaking to some but I couldn't tell you who they were because I don't know.

Q. During the course of the speaking to these policemen do you remember telling them that you had been held hostage and locked in a room for four hours that morning?

A. I was locked in the house and being held not to get out. Robert Sawyer had the key to the house in his pocket.

Q. Do you remember telling the officers that you had been locked up in the house and held hostage for four hours.

A. I don't remember about the four hours. I think I remember I said being kept locked up in the house, yes sir.

Q. Do you remember since you said you did not come home with Robert Sawyer, do you remember what time Robert Sawyer and Charles Lane arrived at the house?

A. Between 7:30 and 8:30 in the morning, that morning.

Q. Were they intoxicated when they arrived?

[656] A. They could both walk a straight line and they were talking all right.

Q. Did they tell you what they had been doing all night?

A. No sir they didn't.

Q. But you had left them in a barroom, correct?

A. I left Robert Sawyer, not Charles Lane.

Q. Do you remember speaking to Doris Vicknair when you went over to make the phone call?

A. I sat down at her kitchen table, yes sir.

Q. Do you remember telling Doris Vicknair when you were sitting there talking to her that you didn't know what happened, that you weren't even home when this happened.

A. I wasn't there when it started, no sir, I wasn't. I was on the phone.

Q. Didn't you tell Doris Vicknair you don't know what happened because you weren't there at all.

A. No I told her I wasn't there when it started.

Q. What time did you say you got back to the house after you made that phone call to your mother at the hospital?

A. I called her and it was about a quarter to 12:00, I got on the phone with her about 12:00 or two or three minutes after 12:00 and I got back to the house, it was about ten minutes after or a quarter after 12:00.

[657] Q. Was Robert drunk when you got back to the house?

A. He wasn't drunk. He could still talk and he could still walk a straight line and he could do a lot of hitting.

Q. You have testified in this courtroom on a number of occasions haven't you?

A. For the pretrial and for the trial of Charles Lane, yes sir.

Q. Do you remember testifying on June 3rd, 1980?

A. I don't remember the date.

Q. But you know you testified around that time.

A. Testified in June, yes sir.

Q. Do you remember testifying on June 3rd, 1980, you were asked the question, "Did he," meaning Robert Sawyer, "get drunk in the Hourglass." Your answer was, "He did." Would you like to look at it?

MR. BOUDOUSQUE:

May I see the portion of the transcript you are referring to.

THE WITNESS:

It's also got there he could still walk a straight line and know what he was doing.

MR. BOUDOUSQUE:

I would like to see the copy. I would object to a piecemeal reading of this portion because I think for the jury [658] to understand the entire nature of the statement of Mrs. Shano when she was questioned that the thing should be read in its entire context so its content will not be distorted.

THE COURT:

You can do that on redirect, Mr. Boudousque.

MR. WEIDNER:

Q. You testified that he was drinking a lot.

A. Sure was.

Q. Did he get drunk. He did. Was he very intoxicated. Bobby can get intoxicated. He can get drunk and

still walk a straight line. He doesn't pass out but he gets violent. Do you remember that?

A. That's right. He does get violent.

Q. He was drinking a lot in the Hourglass.

A. Right.

Q. Do you remember testifying to that now?

A. Yes sir because there is a type Bobby Sawyer drinks and I can't remember the name of it and there is something that is added with it in Seven-up or coke or something like that. I can't remember what it is either.

Q. So contrary to what you testified before Bobby was in fact drunk in the Hourglass Lounge, drunk.

A. No so drunk he didn't know what he was doing, [659] that he couldn't shoot pool.

Q. How many bottles of this MD 20/20 wine did Robert and Chuck have that morning?

A. There were three bottles.

Q. They were drinking them?

A. Yes sir.

Q. They continued drinking them. They just continued drinking them. I believe you testified they had drank about two and a half of them.

A. Right.

Q. When you left your house to go make the phone call was Bobby drunk then?

A. Not really. He was sitting there talking. To me he wasn't. He was listening to his music.

Q. Well was he close to being drunk?

A. Really I can't tell because I don't know how much it would really take to get Robert Sawyer really drunk where he couldn't walk a straight line and pass out.

Q. From the same transcript, page 217. Do you remember this question and answer.

MR. BOUDOUSQUE:

Transcript of what?

MR. WEIDNER:

The June 3rd, the same transcript, June 3rd, 1980.

MR. BOUDOUSQUE:

[660] That is a pretrial motion.

MR. WEIDNER:

The pretrial motion. Do you remember this.

MR. WEIDNER:

Q. At a quarter to 12:00 when you left was Bobby drunk. He wasn't really drunk but he was about there.

A. He was about there but like I said before he can get drunk and still walk a straight line and know what he is doing.

Q. Let me make sure this is correct. On the night preceeding this you and Bobby went out. You went to

Sammy's first where Bobby had a few swallows of MD 20/20 wine.

A. Yes sir.

Q. And then you went to the Hourglass Lounge and Bobby was drinking beer and whiskey at the Hourglass Lounge.

A. Yes sir.

Q. You are saying now you left and went home. Bobby arrives home the next morning with Chuck and they are drinking MD 20/20 wine.

A. Yes sir.

Q. They drink two and a half bottles of that.

A. Yes sir.

Q. Miss Shano, you refer to some telephone conversations that you had with Glenda White. I believe it's Robert's sister?

[661] A. Yes sir.

Q. Do you remember speaking to her on the phone?

A. Her and her husband and his grandmother.

Q. How many occasions would you say you spoke to them on the phone?

A. My recollection, twice. Once here in New Orleans when they came down here and the other was in Florida.

Q. Do you remember what you told them on the phone?

A. I told Robert Sawyer's sister and brother-in-law when they called me from Florida that Bobby did pour the scalding hot water on her and everything else and all and they threatened me and told me if I didn't change my statement and help him, and that's all he said. They never told me what would happen or anything.

Q. You remember the content of your last conversation, telephone conversation?

A. That was the last contents of the telephone conversation that I can remember.

Q. What was the content of the first one?

A. That was his grandmother and them called. They had thanked me for sending Scotty Wayne back up there which is Robert Sawyer's son from Texas. They were worried about him and everything and that my statement would send her brother behind bars for life [662] maybe and they didn't like the idea of it.

Q. How long after this incident occurred did this phone call take place?

A. I don't remember.

Q. A day after, a month after?

A. It wasn't a day after because it was a while after that when they went and visited him in jail. When his grandmother came to New Orleans with his sister and his brother-in-law.

Q. Well was it two weeks, was it two weeks after?

A. I don't remember. I really don't.

Q. You remember the Whites calling and telling you they were concerned about Bobby, they didn't know what was happening and they asked you what had happened that morning. Do you remember that?

A. I told them what happened from the time I got home.

Q. That's right, Miss Shano. You told them what happened.

A. From the time I got home.

Q. Do you remember telling Mrs. White that this incident would never have happened if Bobby wasn't so drunk?

A. No I told her as far as I can remember it wouldn't have happened if I would have been home or my mother would have been home out of the hospital.

[663] Q. So then you weren't home when the incident occurred.

A. When it first started I wasn't, no sir. I was talking to my mother on the phone.

Q. Do you remember telling Mrs. White that you and Robert had gone out the night before drinking?

A. I don't drink.

Q. Do you remember telling Mrs. White that you met this guy Chuck Lane at the Hourglass Lounge the night before the incident happened?

A. No sir I did not.

Q. Do you remember telling Mrs. White that on the morning of the 28th of September you arrived at home,

yourself, Robert and Chuck, you were all so drunk you could barely walk and that you went into the house.

A. No sir because I do not drink.

Q. Do you remember telling Mrs. White that when you went into the house you went and checked the two boys and one of the boys was acting really funny like he had been doped up or something?

A. No sir I did not.

Q. Do you remember telling Mrs. White that you called Bobby, Bobby checked and you went and asked Fran what was wrong with the boy?

[664] A. No sir I did not.

Q. Do you remember telling Mrs. White that Fran said she didn't know what was wrong with the boy and that Bobby got enraged and punched her in the face.

A. No sir.

Q. Do you remember telling Mrs. White that Fran admitted she had given Troy, the youngest boy, something to quiet him down because he had been too active the night before while she was watching him.

A. No sir.

Q. Do you remember telling Mrs. White that at that point you tried to get Fran to tell you what she had given Troy but she wouldn't tell you.

A. No sir.

Q. Do you remember a big argument ensued, Robert became enraged because she wouldn't tell you

what was or what drug or whatever it was she had given Troy?

A. No sir because Robert Sawyer is the one who kept insisting she gave him pills and I would be the first one to take my son to the hospital if I thought he had been doped up.

Q. Do you remember all three of you had gotten enraged because she had given the youngest child pills?

A. No sir because it takes a good bit to get my [665] temper up. It takes, I hold everything in and Frances was my ex-sister-in-law. She was married to my step-brother and her and I never had a cross word and we were very close, more like sisters than sister-in-laws. We tried to keep in touch. I wouldn't have done anything to hurt her and she wouldn't have done anything to hurt me or my children because she loved them. She didn't have children of her own.

Q. Do you remember telling Mrs. White that when Fran wouldn't tell you all what kind of pills she had given Troy that both you and Robert began slapping and kicking her?

A. No sir because I don't go around hitting people I don't even hit my children. I kneel them in the corner.

Q. Do you remember telling Mrs. White that finally Charles Lane who had been standing on the side sort of staying out of this while you all argued, charged past you, pushed Robert out of the way and Robert being so drunk wasn't really doing too much and said by God I will make the bitch tell me what kind of pills she gave Troy?

A. No. No. No sir.

Q. You don't remember any of that.

A. No sir. I didn't say that.

Q. Do you remember telling Mr. and Mrs. White in a [666] telephone conversation just after the victim Fran Arwood died that Fran had died now and that you were in a lot of trouble or could be in a lot of trouble and that you were going to do anything you could to keep yourself out of trouble.

A. No sir I did not.

Q. Do you remember telling Mr. and Mrs. White in a telephone conversation that Robert couldn't have helped anybody if he wanted and didn't know what he was doing because he was too drunk.

A. No sir I didn't.

MR. WEIDNER:

(Addressing the District Attorney) This is a letter written by Cynthia Shano on October 11 to Robert Sawyer.

MR. WEIDNER:

Q. Miss Shano, this is a letter you wrote to Robert Sawyer. You already identified it as being your letter in your handwriting.

A. Uh-huh.

MR. WEIDNER:

Your Honor, for identification purposes I wish to mark this a Defense-1. I'm sorry, this would be Defense-2.

You want me to read the whole story or the pertinent part and put the whole letter in for the jury. I just think I could, I'm [667] trying to anticipate, you wouldn't want the whole letter to be read?

MR. BOUDOUSQUE:

I would like the whole letter to be read.

MR. WEIDNER:

We will put the whole thing in but use this for questioning now.

MR. WEIDNER:

Q. In your letter you wrote to Robert Sawyer on October 11 you stated Bobby, right now I couldn't tell you what is in my statement because I don't really know. The state that I was in at that time I'm trying to put all the pieces together myself right now. All I know is that for sure that boiling hot water was poured on her. As far as the lighter fluid I don't know about that. You stated in this letter you didn't remember what happened on October 11th. This is ten or twelve days past it.

A. When Mr. Boudousque questioned me I also stated that I wanted to blot everything out. Everything out of my mind after I gave the statement.

Q. Did Mr. Boudousque help you remember what happened?

A. Not really because I started talking and putting my pieces together. When I got everything, [668] every piece together then I realized what Robert Sawyer had done and my love for him had started dying and I wanted him out of my life.

Q. When did you realize that?

A. After I finally got all the pieces together, when I realized I couldn't blot everything out of my mind. There was too many things in the house that reminded me.

MR. WEIDNER:

Your Honor, I have no further questions.

REDIRECT EXAMINATION

MR. BOUDOUSQUE:

Q. Cynthia, do you recall when we first met, you and I?

A. Yes sir, when I was called into your office.

Q. And that was many months ago, was it not?

A. Yes sir.

Q. Who was present when I first was introduced to you. Do you recall?

A. I don't really remember. I know I think my sister was with me.

Q. Do you recall if there were any other personnel from the District Attorney's Office that was around?

A. I really don't remember. It's been a while back.

Q. Do you recall what I told you at that time about [669] what you would have to testify.

A. You told me to tell the truth and nothing but the truth.

Q. At first did you indicate to me that you had difficulty with your testimony.

A. Yes sir I did.

Q. What did you tell me?

A. I told you that I had tried to block everything out of my mind.

Q. And what did I tell you in response to that?

A. That I had to put it all together to remember that there was no way of blocking it out of my mind.

Q. And did I tell you why I said that?

A. That I don't remember.

Q. You've stated that you don't drink.

A. Yes sir, I don't.

Q. Why don't you drink?

A. I have a brother that is an alcoholic up in Texas. He is dying with cancer and all. Okay. I also have a mother that drinks. She had quit for Charles Lane's trial but after that she started drinking pretty heavily again.

Q. Do you love your children?

A. I love them very much.

Q. Have you tried to keep your children?

A. Yes sir I have.

Q. Do you care about the health of your children?

[670] A. Yes sir I do. Can I say something. Right after Charles Lane's trial, well the day before I came on

the stand for Charles Lane's trial I brought my youngest son to a doctor for a cold. All right. I came to Charles Lane's trial that Thursday was my last testimony. That Sunday night I had my youngest son in the hospital with bronchial pneumonia. They had him under oxygen, under an oxygen tent and they had to wind up putting him in isolation and I almost lost him and if that's not love for a child I don't know what it is.

Q. How did you know Frances Arwood?

A. She was my ex-step-sister-in-law. She was married to my step-brother.

Q. I show you a letter, September 19, 1979. Who is this letter written to?

A. My sister-in-law to me.

Q. By whom?

A. My sister-in-law, Frances.

Q. And what was the basic content of that letter?

A. Sir?

Q. What was the basic content of this letter?

A. She wanted me to try and talk my nephew into going to a class reunion dance because she even said how about that, after two marriages I'm still looking for someone.

Q. What did you tell her?

[671] A. I told her that I would talk to my nephew about it.

Q. Did she in fact date your nephew, Tommy Champagne.

A. I don't know if you could call it dating or not but he went and picked her up and brought her to the house that night.

Q. Why was she staying at the house?

A. Well he brought her to the house that night, she wanted to see my mother. She didn't, she hadn't seen her in a long time. She still considered my mother as a mother-in-law and she had never met my youngest son and she wanted to see the children and she come [sic] over and my nephew was having car trouble and it wouldn't start so he couldn't bring her back home and again Robert Sawyer said he didn't have the gas to bring her there so Mother said she could spend the night at the house. Well they were drinking that night and that night my mother broke her nose and wound up in the hospital and Fran said she would stay there to help me take care of the children so I could run back and forth to the hospital.

Q. Cynthia, describe your state, your mental, emotional and physical state when you went to the police station to give your [672] statement to Detective Geiling.

A. I was pretty well a nervous wreck.

Q. At that point in time were you thinking about Robert Sawyer's sister, Glenda White or his brother-in-law, Mr. White?

A. No because I didn't even know they were going to contact me or they knew about it.

Q. Were you thinking about his grandparents, his grandmother?

A. Not really I wasn't.

Q. What was on your mind?

A. All that was on my mind was they had taken, Robert Sawyer and Charles Lane, they had done something to a girl, a human being that should not have been done to anybody because Frances did not deserve that.

Q. Did Robert Sawyer in fact speak to you at the police station?

A. Yes sir he did when he passed by me.

MR. WEIDNER:

Objection, Your Honor.

MR. BOUDOUSQUE:

On what basis?

MR. WEIDNER:

I request the jury be removed.

MR. BOUDOUSQUE:

I withdraw the question.

MR. BOUDOUSQUE:

Q. When you gave this statement what was on your [673] mind?

A. Telling the truth as far as I could remember, only a few things I left out. That's all.

Q. You were pretty well emotionally shook up?

A. Yes sir.

Q. The time of this statement is what?

A. I can't read it.

Q. Do you recall how many hours after the incident you gave this statement?

A. I don't really remember that either.

Q. Was it a long period of time?

A. I don't know. I think we were there until after dark if I'm not mistaken.

Q. Not how long you were there but when did you first give your statement?

A. I don't remember because my watch, Robert Sawyer had it in his pocket and I never got it back so I didn't have a watch on me.

Q. In this letter when Mr. Weidner questioned you it says Bobby, right now I could not tell you what is in my statement because I really don't know. This letter was written on October 11, was it not?

A. Yes sir.

Q. At that point in time do you recall the first time you had reviewed your statement given to Detective Geiling?

A. I had reviewed it after I gave it to him.

Q. Right.

[674] A. When I went before the Grand Jury.

Q. And what date was that?

A. That I don't remember either.

Q. Was that before or after this date?

A. I think it was after but I'm not sure.

Q. Do you recall the date that Frances Arwood died?

A. November 21st.

Q. And did you go in front of the Grand Jury for an attempted murder or for a murder?

A. I don't remember. I think it was murder if I'm not mistaken.

Q. So it would have had to be after the date that she died, correct?

A. I think so.

Q. This date is what?

A. 10-11-79.

Q. Is that before or after Frances died?

A. That's before she died.

Q. So you had not read your statement until you went to the Grand Jury according to your testimony.

A. That is right.

Q. Do you recall reading the statement with anyone in the District Attorney's Office?

A. After the Grand Jury, in the D.A.'s Office, yes sir.

Q. Did you and I go over your statement?

A. Then, yes sir.

[675] Q. Did that help you to refresh your memory?

A. Some but I had pretty well, some of the pieces I had put together, there was different parts I didn't remember, even during the Grand Jury when I went before them I knew from the middle to the end but I couldn't remember the beginning.

Q. Why couldn't you remember the beginning?

A. I tried after it happened to just try to block it out of my mind. I had two children to raise.

Q. Okay now it says in this letter on page 2, Bobby, right now I couldn't tell you what is in my statement because I really don't know. Is that factually accurate, is that a correct statement?

A. I didn't know what was in the statement at the time because I didn't remember.

Q. The state I was in I am trying to put all the pieces together myself right now. All I know for sure is that boiling hot water was poured on her.

A. That's right.

Q. As far the lighter fluid I don't know about that. All I know is that if I wouldn't have went and called mom to see how she was and tell her later on that we would be up there maybe I could have stopped it or maybe be right along side her. I really [676] don't know. No one deserves

what happened to her, whether they wanted it or not. Don't get me wrong, I'll love you always and I will never stop. You were six months of my life and the boys'. We have had our bad times and we have had our good times but baby you don't remember hitting me or threatening me. You say you really don't know about the lighter fluid, about the woman being set on fire. Did you actually see anyone set Frances Arwood on fire?

A. No sir. All I know is what Robert Sawyer and Charles Lane had told me.

Q. Where were you when she was set on fire?

A. In the bathroom.

Q. And what did Robert Sawyer and Charles Lane, Robert Sawyer tell you?

A. They had told me that Charles Lane said that Bobby had set them on fire and that is when Bobby got up and said nobody told you to stay inside of her when I told you I would show you how hot pussy could get.

Q. So you did not yourself observe the actual action of Robert Sawyer setting Frances Arwood on fire.

A. No sir I didn't.

Q. Is that what you meant in that letter right there?

A. Yes sir. I didn't see.

[677] Q. Are you concerned about your children?

A. Yes sir. I love them very much.

Q. Are you concerned about what these events may or may not have done to your children?

A. Yes.

Q. Explain the impact, the emotional impact this crime may have had on your children. Describe your feelings about your children after this crime.

A. I love them and it took me a good while to get my oldest son calmed down from it but he has some memories of it whenever water is spilled on the floor it all comes back to him.

Q. What does he do?

MR. WEIDNER:

Objection, Your Honor.

THE COURT:

What is the purpose?

MR. BOUDOUSQUE:

To show that she cares about her children and that she has tried to take action to get her children to forget what has happened. That she herself has blocked this incident out of her head and Mr. Weidner has tried to attack this woman's credibility because she doesn't remember or doesn't recall and I think it's important the jury know what actions Mrs. Shano took [678] after this event took place.

MR. WEIDNER:

I can understand that the woman loves her children.

THE COURT:

What question did you ask?

MR. BOUDOUSQUE:

I asked her what were the children's reactions after this incident and what did she to do [sic] counteract that action.

THE COURT:

That is two questions.

MR. BOUDOUSQUE:

One was going to follow the other. My question was going to be what have the children done since this incident.

THE COURT:

You can answer that question.

THE WITNESS:

Well the baby, he was still young. He was only two years old so he got upset because they both love their Aunt Fran, they called her, but the oldest one, he took it more because he was older and it took us a while to get him calmed down, to show him we love him and to talk to him and everything and I even lied, telling him his Aunt Fran would be all right and then when she died I had to sit down and [679] explain to him she was in heaven and nobody would hurt her again.

MR. BOUDOUSQUE:

Q. How old was your son at the time, your oldest son at the time of this incident?

A. He was only four years old.

Q. Do you recall if you spoke to the police after this incident?

MR. WEIDNER:

Objection, Your Honor. May we approach the bench.

(Bench conference between the Court and Counsel.)

THE COURT:

You can answer the last question either yes or no.

THE WITNESS:

I think it was the next day, Detective Livaudais.

MR. BOUDOUSQUE:

Q. Just a measure of caution, don't go into any statement. Do not go into the contents of the statement, just say if the statement was given and when it was given to you.

A. Yes. My oldest son did give a statement and I believe it was the day after the incident happened.

Q. And how old was he at this time?

A. Four.

[680] Q. Cynthia, how well do you know Gladys or Glenda White?

A. I've never met the lady.

Q. How well do you know her husband?

A. I have never met him.

Q. And how well do you know the Defendant's grandmother?

A. I met her one time.

Q. What did they tell you when they spoke to you on the telephone. Let me limit that question. What did Mr. and Mrs. White tell you when they were on the telephone?

A. It was mostly telling me to change my statement, that my statement could hurt her brother and then they got up and accused me, I was trying to have him convicted because he had come into some money when he turned twenty-eight or twenty-nine. Okay. They thought that he turned the money over to me, give me power of attorney which I didn't know about.

Q. Where was Robert Sawyer going to come into some money?

A. In Memphis or Middleton, something when his mother died she left the money and she [sic] couldn't get it until he reached a certain age. That's what I was told.

Q. What is the Defendant's occupation?

A. He told me that he is a pilot on a boat.

[681] MR. BOUDOUSQUE:

I have no further questions.

RECROSS EXAMINATION

MR. WEIDNER:

Q. Cynthia, in your letter to Mr. Sawyer, you said but baby you don't even remember hitting me. Didn't

you write that because you knew at the time this happened Bobby was so drunk he couldn't remember what happened?

A. Not really. Bobby had even tried –

Q. You can explain your answer but answer yes or no.

MR. BOUDOUSQUE:

I think she said not really.

THE COURT:

Answer the question.

THE WITNESS:

When we were in Texas Bobby tried strangling me and then he stopped, about a block or block from where we had lived at. He had even threw a knife at me in somebody else's house, broke the knife and busted up their table in Nederland Texas.

MR. WEIDNER:

Q. Now will you answer my question. I believe you wrote that because you knew Bobby was so drunk the day this incident occurred he couldn't remember what happened.

[682] A. I really don't know because I don't know if he wanted to remember or didn't want to remember. I can't answer yes and I can't answer no.

Q. You stated you don't even remember in your letter.

A. That he didn't remember, right.

Q. That's what you said, baby you don't even remember. Didn't you write that because you knew he was so drunk he couldn't remember?

A. I cannot answer yes and I cannot answer no because I would be lying.

MR. WEIDNER:

Thank you. I have no further questions.

MR. BOUDOUSQUE:

Q. Cynthia, how would you describe these letters?

A. What do you mean?

Q. Business letters?

MR. WEIDNER:

I object to this, this is redirect. I went into nothing on this on recross examination.

THE COURT:

If that is the basis the Court overrules that objection.

MR. WEIDNER:

Note my objection.

[683] (Bench conference between the Court and Counsel.)

MR. BOUDOUSQUE:

Q. This is the letter of January 7, 1980. I will not read the entire letter, just some excerpts. Dear, just

thought I would drop you a few lines to let you know I haven't forgot about you and also to let you know I am still thinking of you and that I love you. I know that you don't want to hear from me or it sure seems to me that way because you don't want to write me anymore. Be sure to give Wayne and Troy a kiss for me. I will send them all my love. In these letters does Robert Sawyer, does he speak of how much he loves you?

A. Most of them, yes sir.

Q. Does he speak about how much he cares for you and the children?

A. Yes sir.

Q. Does he speak about how he's a changed individual?

A. Some of them, yes. That's when he started going to church.

Q. Does he tell you that he wanis you to stand by him?

A. Yes sir. He started that from the beginning.

Q. And you had testified to that fact, have you not on direct examination, that at all [684] times Robert Sawyer has told you you had his life in your hands.

A. That is right.

Q. That's your testimony, it's very important to him, is it not?

A. In fact according to what he had been telling me and his sister and his brother-in-law, yes sir, they all put it in my hands as they put it.

Q. At any time in these letters did he try to minimize his actions on September 28, 1979?

A. If I recall he tried putting all the blame on Charles Lane.

MR. BOUDOUSQUE:

I have no further questions.

MR. WEIDNER:

No further questions.

(Recessed for lunch at 1:00 p.m. Jury excused. Reconvened at 2:20 p.m. Polling of the jury was waived by both the State and the Defense Counsel.)

[796] DOCTOR ALBERT B. DE VILLIER, 2731 Chestnut Street, New Orleans, Louisiana, was called as a witness by Counsel for the Defense and after first being duly sworn was examined and testified as follows:

VOIR DIRE EXAMINATION

MR. WEIDNER:

Q. Doctor Devillier, would you state your occupation for the Court please.

A. I am a physician and I practice psychiatry.

Q. Would you give us some of your background in the field of psychiatry.

A. Yes. I have been licensed, a licensed physician in the State of Louisiana since 1966. I finished LSU Medical School and after that I completed an internship at Charity Hospital, then after that two years residency in pediatrics. After that I was hired as a physician by the Department of Psychiatry, LSU School of Medicine, for one year and following that I did a three year residency in psychiatry and I completed that residency in 1973 with LSU School of Medicine. I haven't taken board exams but I am qualified for the boards since 1973. I have worked for the State of Louisiana under Civil service employ and I have worked primarily at the West Jefferson Mental Health Clinic. For a while I did [797] for a short period of time at the New Orleans Mental Health Center. I am in the private practice of psychiatry since 1973 and I have also testified in court since about 1973 or '74 in regards to sanity hearings.

Q. Excuse me, Doctor, can you explain what you mean by testifying in regards to sanity hearings.

A. Very often in court they will have what is known as sanity hearings for individuals who may have or there might be some indication of some mental problem and a sanity commission is appointed and this commission has to consist of two doctors, preferably psychiatrists.

Q. Doctor, are these persons charged with criminal offenses?

A. The sanity hearings that we have been doing, yes, have been individuals with criminal offenses, yes. Additionally I do a lot of work for Associated Catholic Charities in the way of consultation in terms of children's homes and etc.

Q. Doctor, when did you first begin doing sanity hearings and dealing with people charged or allegedly charged with criminal offenses?

A. I think that is approximately 1974. I can't be definitely sure. Approximately 1974 and [798] all of them consisted in the Twenty-Fourth Judicial District Court except for one in the Twenty-Second Judicial District Court in the State of Louisiana.

Q. Do you have a particular expertise in the field in dealing with persons charged with criminal offenses?

A. No sir, other than this experience that I have had and my own interest in that particular field of forensic psychiatry.

MR. WEIDNER:

I would offer the Doctor as an expert in the field of psychiatry.

CROSS EXAMINATION

MR. BOUDOUSQUE:

Q. Doctor, are you board certified?

A. No.

Q. Have you taken the oral test or the written test?

A. No sir.

MR. BOUDOUSQUE:

I have no further questions.

THE COURT:

The Court accepts Doctor DeVillier as an expert.

DIRECT EXAMINATION

MR. WEIDNER:

Q. Doctor, in connection with your being a physician and a psychiatrist have you [799] examined one Robert Sawyer?

A. Yes I did.

Q. Pursuant to your examination of Mr. Sawyer, were you able to arrive at any psychiatric diagnosis?

A. Yes I did. I don't have a copy of that particular report.

(Counsel hands document to witness.)

MR. WEIDNER:

Q. The document is signed by yourself marked June 10th, do you remember that?

A. Yes I do. Are you asking me at this time the psychiatric impression at that time?

Q. Yes.

A. It is my impression on that examination that Mr. Sawyer was legally sane and he knew right from wrong and was mentally competent and that he understood the nature of the charges against him and was able to assist Counsel in his own defense.

Q. And that was at the time you made your examination.

A. Yes sir.

Q. Doctor, if I were to give you a hypothet based on the facts which are presently in evidence in this trial as to certain actions done by Mr. Sawyer at a time in September of 1979, in connection with your examination of him and the hypothet I am [800] giving you, would you be able to render an opinion as to his condition or mental condition at the time this incident occurred.

A. I can render an opinion but again this wouldn't carry as much value as examining him right at the time of something occurring.

Q. I understand, none of us was there. Doctor, on approximately September the 27th, 1979 at some time around the time of 8:00 o'clock in the evening, Robert

Sawyer went out to various lounges and began drinking. He drank a combination of MD 20/20 wine, shots of straight whiskey, beer, continued drinking without sleep from say approximately 8:00 p.m. in the evening, all night, his condition has been described at approximately 7:00 a.m. the next morning on September 28 when arriving home he was staggering drunk, barely able to walk.

A. What time?

Q. Approximately 7:00 a.m. in the morning. This is after being drunk all night long, continued to drink MD 20/20 wine at that time. At some time during the next five to six hours some very heinous acts occurred. At approximately 1:30 in the afternoon Robert Sawyer was described as sitting on the floor with his legs crossed [801] looking glassy eyed and appearing to be in a stupor. This description given by a lay person such as myself, not by any physician.

MR. BOUDOUSQUE:

I would object to his being in a stupor, stupor being a subjective term and there is no evidence as to how intoxicated the man may have been. I would like to know what witnesses said he was in a stupor.

MR. WEIDNER:

Your Honor, Miss Sylvia Champagne testified Mr. Sawyer was sitting on the floor cross-legged looking glassy eyed.

MR. BOUDOUSQUE:

She didn't say glassy eyed.

MR. WEIDNER:

She also gave that statement to the police officer.

MR. BOUDOUSQUE:

I will withdraw it for the purpose of this hypothetical. I will withdraw my objection.

THE COURT:

Go ahead with the questioning.

MR. WEIDNER:

Q. With the facts given to you from that hypothet, Doctor, can you render an opinion as to the [802] condition you believe Robert Sawyer was in during the time.

A. Well based on this information it is very possible a person under a great deal of alcohol and drinking continuously and assuming that the condition described is described by a person is fairly reasonable, a fairly reasonable individual who can assess the situation, you could see he was somewhat of a toxic psychosis. That he was probably, you can't say definitely, but that he probably was suffering with a toxic psychosis.

Q. What is a toxic psychosis, Doctor?

A. First let's use the word psychosis. Psychoses would be an individual who would have a thought disorder. The thinking is terribly disturbed. He may or may not be hallucinating. Hallucinating means he may be hearing voices that aren't there. He may be seeing things that aren't there. He may be delusional. He may be irrational in his behavior. He may develop irratic behavior. Now toxic, we use as a word to describe the cause of the

psychosis and what he has within his blood is a toxin which gets to the brain, gets to the brain and creates the disturbances that causes the actions you might see or the [803] hallucinations. You can consider alcohol a toxin. We often use this term to describe individuals who are suffering with a psychosis secondary to alcohol, to drugs, to a medical condition. They may have kidney disease and have elevated blood urea, nitrogen for instance, various states that is caused by a toxin. It might be infectious. It might be something caused by some type of pneumonia or meningitis they have in their body and so we use the two terms, toxic and psychoses.

Q. Doctor, a person who is suffering from toxic psychoses is it possible for them to form an intent or to actively desire something to happen?

A. If you make the diagnosis of toxic psychoses it would hardly be likely that that person could form intent to do anything but he is liable to act out in a number of different ways. What you are doing in this situation you are releasing impulses that a person may have. In other words, whatever may come to mind they may do. There is a release of the things that controls those particular impulses. Mostly in regard to behavior or maybe in regard to thinking.

Are they in control of that or is the disease in control of that, the psychoses?

[804] A. I don't understand your question, it's too separate.

Q. Is their conduct precipitated by the psychosis?

A. The conduct is precipitated by the psychosis. The psychosis is a descriptive term to describe behavior, thinking, of that particular individual. The behavior that goes array or disarray is caused by the toxin that settles in the brain.

Q. Now Doctor, in layman's terms could a person in this state, in other words in the state we have described with this amount of alcohol be in a stupor, I'm talking about the layman's definition of forming an intent or actively desiring something to happen, could they do that?

A. If you describe a person having the toxic psychoses it is highly unlikely they would be able to do that. Then you have, they could form intent in doing things, their behavior would not be erratic. They could have planned out behavior.

MR. WEIDNER:

Thank you, Doctor. I have no further questions.

CROSS EXAMINATION

MR. BOUDOUSQUE:

Q. When did you originally examine the Defendant?

A. According to my report I examined him in [805] Jefferson Parish prison on June 9, 1980.

Q. And is that the only time you examined him during the course of this last year?

A. Yes sir, that is the only time.

Q. And how long did you examine him?

A. I don't have a record. I think when we did the sanity hearing I probably gave an indication at that time as to how long I spent with him. Usually in these examinations they will sometimes last, they usually last at twenty to thirty minutes but sometimes longer but in most cases twenty to thirty minutes.

Q. The only time you spent with this Defendant, the only information you have at this point in time in reference to this man is basically the twenty or thirty minutes you spent with him on June 9 or June 10.

A. Yes sir.

Q. And you say an examination. An examination basically in psychiatrict [sic] terms is nothing more than an interview. You didn't do any tests or anything else. You basically went to talk to the man and asked about what he understood, what the nature of the charges were against him.

A. No sir I think there should be some understanding about what we do.

Q. What is a psychiatrict [sic] examination?

[806] MR. WEIDNER:

Excuse me. Would you allow the Doctor to answer the question first.

MR. BOUDOUSQUE:

I think he was going to do that.

THE WITNESS:

These examinations we do are what is required, I think I am not legally, really I don't know but it is required by us as psychiatrists. It is a clinical evaluation we are trained as a medical doctor, you have to be a medical doctor in terms of doing this type of thing. We do a clinical interview during the time we do this clinical interview it consists of asking the individual questions and usually we get some background information. That is a history taking kind of thing which consists of what the individual's past is.

MR. BOUDOUSQUE:

Q. What else do you do?

A. During this time I am observing the way he approaches, the way he answers the question, the affect he shows. The way he organizes, in terms of answering the question or what information he volunteers.

Q. And in this case you examine or you interview the Defendant some ten months after the [807] commission of the crime, did you not?

A. On June 9, 1980.

Q. Okay, what information did you have regarding the Defendant prior to your interview. Did you read any of the police reports prior to your interview?

A. No sir. I never did until recently I read something but not completely read it.

Q. Did you read any of his statements?

A. No sir.

Q. Did you read any letters that he may have written?

A. No sir.

Q. Which would give you indication as to his actions at the time of the crime as well as give you indication as to his present state of mind?

A. The only information I have was what he supplied me.

Q. So you didn't review any of the evidence in this case prior to your interviewing the man.

A. No sir.

Q. So basically a large part of your examination, Doctor, relies on what this man told you, correct?

A. Yes.

Q. And if the factual information given to you is in fact incorrect or if the Defendant was lying you could derive at an erroneous [808] conclusion, could you not?

A. I don't think we are looking for in terms of talking to them as you say talking to them but in terms of clinical examination "lying" to us or not, that is not exactly the basis of our interview.

Q. Basically what you do, Doctor, is you rely on your training and your books and your interview with the Defendant and then you draw a conclusion which is subjective at best.

A. Yes.

Q. There is no objective way known to psychiatry is there not to determine a man's mental state of mind at the time of a commission of a crime.

A. There is no way to at the time of the crime unless I examinae [sic] him right at the time.

Q. Have you not so stated that on previous occasions that you recall testifying at this sanity commission and stating something to the effect there wouldn't be any testing that could bring anything out like that. You would have to be there and have a person examined and I would have to examine the situation and his behavior right at that time.

A. That's vorrect [sic].

Q. So what you are doing now is based on limited [809] hypothet that may or may not contain factual accuracies. You are rendering a highly speculative opinion, are you not, Doctor?

A. I am rendering an opinion based on the information that I was given in the hypothet.

Q. Okay Doctor, now you said based on the hypothet. You knew that you were going to be called to testify today, did you not, Doctor?

A. Yes.

Q. You in fact had spoken to Mr. Weidner on previous occasions, did you not, Doctor?

A. A couple of occasions.

Q. Did he not tell you in this case what his defense was going to be?

A. I think he did.

Q. Did you talk to him or converse with him as to how your opinions would be, as to his defense.

A. He asked me with regard to the same hypothet they have asked right now.

Q. You knew you were going to render based on that hypothet the same opinion you have just given this jury.

A. Yes.

Q. Did you ever ask to see the statement of the Defendant to see his actions two hours after the commission of the crime?

[810] A. No I saw it a few minutes.

Q. Did you ever ask to see over ten letters that were written by the Defendant to a woman by the name of Cynthia?

MR. WEIDNER:

I object to that. He only had the information I gave him.

MR. BOUDOUSQUE:

Your Honor, I think this goes to the weight of this man's opinion and these are very important factual data this man should consider and I think I have every right to ask that opinion.

MR. WEIDNER:

I think the District Attorney should quit badgering the Doctor and give him the statement and see if that changes his opinion.

MR. BOUDOUSQUE:

I'm not trying to badger Doctor DeVillier.

THE COURT:

You can answer the question. You didn't consider any letters anybody might have written.

THE WITNESS:

No sir.

MR. BOUDOUSQUE:

Q. So you weren't shown any letters, were you

[811] shown a copy of the police report?

A. Just a few minutes ago.

Q. Just a few minutes ago but you had already arrived at your opinion before you were shown a copy of the police report had you not?

A. The opinion was based on a hypothet.

Q. Merely on a hypothet with the facts and circumstances as stated to you by Mr. Weidner, correct?

A. That's correct.

Q. In order to have what you call, Doctor, toxic psychosis you are stating the fact that the man would have had to have some type of hallucination or some type of delusion, did you not say that?

A. I said he may.

Q. Is that probable he would have?

A. Not necessarily. In other words, you know, a conglomerate of symptoms.

Q. Didn't you tell this jury based on the hypothet given to you by Mr. Weidner you were of the opinion the Defendant had to have some type of delusions or hallucinations, otherwise he couldn't have committed these acts?

MR. WEIDNER:

We object. The Doctor did not testify to that.

THE COURT:

[812] The Doctor can so answer the question.

THE WITNESS:

Well the only thing I can say I don't recall answering to that.

MR. BOUDOUSQUE:

Q. What did you say about the delusions and hallucinations during the course of your direct examination?

A. In terms of delusions and hallucinations I was describing toxic psychosis,

Q. Describe toxic psychosis again if you would please.

A. Could we read it again?

THE COURT:

Describe it.

MR. BOUDOUSQUE:

I would prefer the Doctor give his own definition.

THE WITNESS:

I would say divided up in two parts. Psychoses is an alternate state of mind. A thinking or thought disorder.

MR. BOUDOUSQUE:

Q. Now does a person if he has a psychoses when would you determine an individual had a psychoses if he had it, does he always have it?

A. No sir, not necessarily.

Q. What brings on a psychosis?

[813] A. When we are talking about toxic psychosis?

Q. I'm talking about psychosis period, any type of psychosis. What are some of the reasons an individual becomes psychotic. What brings on psychosis?

A. In schizophrenia patients.

Q. Is Mr. Sawyer evidenced any signs of schizophrenia, do you know?

A. No.

Q. At the time of your interview did he evidence any signs of any type of psychosis to you?

A. No sir.

Q. In fact, Doctor, have you not so stated in your report that he denies having any type of hallucinations and delusions and there is no evidence of any thought disorder.

A. That's correct.

Q. So if there is no evidence of any thought disorder, Doctor, at the time you examined him, well obviously there could not be any evidence of any type of psychoses at that point in time.

A. Right.

Q. Doctor, in fact in your testimony in June, June 12th, 1979 under oath didn't you so state you observed no evidence of any type of psychoses, toxic or otherwise of the Defendant at the time of your examination.

A. That's correct.

[814] Q. Now Doctor, when an individual has a psychoses or a toxic psychoses I believe you have stated, he would not be able to formulate intent.

A. Well I think that would be one of the basis of saying a person is psychotic or suffering with a toxic psychosis. He would be in such a stupor state of mind that you would have an alternate state of mind. He would be acting more on impulse rather than forming an intent of what he is going to do.

Q. If a person acted over an extended period of time and did various and sundry actions, would that indicate to you he knew what he was doing and was not suffering from a psychosis?

A. No sir. It would have to be based on what were his acts and what was his behavior part of the psychosis, part of the behavior might be rather bizarre behavior.

Q. Would he remember?

A. He may or may not. In toxic psychosis it's highly likely he may have some difficulty. He may remember bits and pieces, the state of mind might vary according to the various things that are affecting this man.

Q. Basically a man who would suffer from a toxic psychosis would only recall the events in [815] bits and pieces and would only have an accurate memory of what transpired?

A. I didn't follow that total question.

Q. Didn't you say, Doctor, if an individual was suffering from toxic psychosis more than likely, probably the only way he would remember an event would be in bits and pieces.

A. That could happen, yes. I'm not saying definitely. It's not definite. It depends on the amount of toxin in the blood. I assume, and the effect it has on the brain at that particular time, the levels may go up and down.

Q. So there is a whole lot of subjective factors, is that no correct, Doctor. All these factors that you have just described have to go to your evaluation.

A. Right.

Q. So based on his limited hypothet given to you by Mr. Weidner without any type of consideration for all those factors you are going to tell this jury that man could

not have possibly intended his actions on the day of the commission of the crime.

A. I am not saying anything about this man. He gave me a hypothet.

Q. Doctor, you are telling all about what this man did and you rendered an opinion based on [816] that limited information. Doctor, if an individual was suffering from toxic psychoses [sic], would he recall with specificity or would he recall with accuracy certain events that had occurred over an extended period of time. That is highly improbable, is it not?

A. That's correct.

Q. Now Doctor, I'm going to show you a statement that you have not read that was given by the Defendant. I want to show you bits and pieces of it at approximately two hours from the time that he had allegedly suffered from this psychoses. [sic] Okay. When a person suffers from a psychosis how long would an individual suffer from a psychosis, an hour or two hours or ten hours?

A. I don't think there is any specific time limit.

Q. Well what would be the normal?

A. Well I don't think there is any normal. Maybe over a matter of seconds, a matter of days or months.

Q. All right, do you think a man that was suffering from psychosis would understand questions that were asked to him?

A. No, not completely, no.

Q. Do you think if he said, it says here Question: Are you able to read, write and understand the English language. Yes. Have you been [817] advised –

MR. WEIDNER:

Excuse me. I think the District Attorney ought to tell the Doctor at what time and place that statement was taken.

MR. BOUDOUSQUE:

I believe the statement was given two hours after the alleged psychoses [sic] and that was what I was going into. 4:01 p.m.

THE WITNESS:

All right.

MR. BOUDOUSQUE:

Q. The crime occurred anywhere from in the morning sometime before noon to approximately 2:00 p.m. At 2:00 p.m. or thereabouts that is when the Defendant was in this so-called alleged stupor. Now that stupor, before I get into that statement, in Mr. Weidner's hypothet the fact the man was in a stupor would be a very important consideration for you, would it not, very important.

A. Right.

Q. If a man was in a stupor would he be able to understand another person talking to him?

A. Not necessarily, no sir.

Q. Would he be able to speak in a coherent fashion?

A. No.

Q. Would he be able to talk in a normal fashion?

[818] A. No.

Q. Would he be able to respond to commands of a police officer if he was in a stupor?

A. Well I am saying no but of course I am qualifying that and saying you are talking about various levels of stupor.

Q. Everything is qualified here, Doctor. You are really trying to do an opinion to something there is really no way you can know what it's all about.

A. I'm only giving an opinion because I was asked.

Q. I can appreciate that but I think you can appreciate what I have to do. So Doctor, if a man, have you ever seen a man in a yoga position?

A. Yes.

Q. Well people do exercise, yoga and some people find that position relaxing, correct?

A. I guess, yes sir.

Q. It may not be relaxing to you but it may be to some people. Let's say that was a relaxing position for Mr. Sawyer. He may have been feeling some type of gratification and he was sitting there just enjoying himself. Would that change your hypothet, Doctor?

A. Well you know if someone who observed him, he was sitting there, he was enjoying himself of course it would change it. If it's [819] based on an accurate opinion

but you know, a person who is fairly reasonable and can evaluate the situation, when you ask about what kind of evaluation we do, that is part of our clinical evaluation, the way a person is acting.

Q. Doctor, I understand but it would change your opinion if you were told this man when asked my God what did you do to this girl, he just shook his head and pointed to another individual, that is kind of a coherent type of action when you shake your head and point directly to someone else.

A. It depends on how coherent.

Q. Right. Right. Okay and if about five minutes after that a policeman came and ordered the Defendant up from a chair which he had gotten into from his position of sitting on the floor and got into a chair and he extended his feet on a mattress again which would indicate a relaxed position, if he was ordered out of that residence and he listened to that command and walked out in a normal fashion, and if understood his rights and indicated he understood his constitutional rights, that would change your opinion, would it not?

A. It would change the opinion as to how he was acting at that time, it sounds like he [820] could respond.

Q. So what you are saying the only way he could not, that he could be suffering from toxic psychosis is if he couldn't respond, right?

A. No. He could be suffering from toxic psychosis and respond. It depends upon, you know, a total evaluation, just responding to one command or just walking

straight doesn't necessarily mean a person might not be in a psychotic state.

Q. I thought you said a person could not be in a stupor if he walked in a normal fashion and he spoke in a normal fashion and he was coherent as we all are.

A. No, then he couldn't be in a psychosis, no.

Q. And a very important element in your decision is the fact the man obviously had to be in a stupor, correct. Didn't you just testify an important part or important element of your consideration –

A. Yes, that is an important element.

Q. Now I want to read some excerpts of a statement that was given by the Defendant about two hours after he was to have been in that alleged stupor. The stupor described to you by Mr. Weidner. The man was advised of all of his constitutional rights and he said he understood them. He sat and smoked a cigarette. Lit the cigarettes of his own [821] free will, wasn't quivering, wasn't shaking indicated that he understood everything that was happening. There was indication he was aware of his surroundings and the statement he was giving. He was somewhat fatigued but he was alert and it was very important to him that he not use as much vulgarity in his statement as he may have originally went into, would that change your opinion, Doctor?

A. I didn't understand if you are asking me would it change my opinion about what. Are you asking me what would I consider with that type of information, what would be his state at the time. It would not sound like he was suffering with a psychosis.

Q. Right and if he got there and said upon the interview she gave my two adopted kids, they are not exactly my kids, yet I'm supporting them, she gave them dope. He's talking about why he did the acts he did, the acts he's accused of doing, then I got mad and I hit Fran in the jaw and asked her what the fuck she was doing giving my kids some pills and I told her not to do it again. Is that the type of statement of a man relating to a factual even that occurred earlier that evening sound to you like a man suffering from a psychosis?

[822] A. At the time he was giving the statement?

Q. Based on the statement, does that sound like a man who suffers from a psychosis at the time of a crime?

A. It depends on the information given, how accurate it is.

Q. This was given by the Defendant and then he goes on to say then I backhanded Fran and I told her not to give her [sic] any of my kids any frigging ass medicine which she said she didn't and I cooled off and Fran was bleeding from the cheek and corner of the mouth. He recalls this victim, Cindy went in and got three bottles of MD 20/20. He recalls the fact he started drinking again and Fran started throwing up. He recalls at the time of the crime the victim was throwing up. I told her to go take a bath. He recalls his command to the woman and she went into the bathroom and this other fellow we brought home with us, he started pouring cold water over her. He recalls that factual reality. Would that change your opinion somewhat?

A. That is a factual reality.

Q. This is by the Defendant himself. Don't you think that is very important information?

A. That depends on what he says is accurate.

Q. Well Doctor, isn't that true in all circumstances?

[823] A. Of course.

Q. And then he says then I poured pans over her myself and it looked like she was coming out of it. I went where Cindy was and sat down. I heard this other fellow hitting Fran. He recalls the other fellow punching. Does that sound like he was suffering from hallucinations or delusions?

A. No.

Q. But her head was under the water and this other fellow was hitting her in the back and I made him stop it and I grabbed Fran by the head of the hair and yanked her out of the tub onto the floor. Cindy brought the blanket in and we covered her up. Again the same question, is that a little more information that could help you change your mind, Doctor?

A. About what?

Q. About whether the Defendant was suffering from a toxic psychosis at the time this crime was committed.

A. What are you basing it on, on the information he is giving or what he is saying actually occurred or what actually occurred?

Q. Doctor, I wasn't there nor were you. The only thing I'm basing my comments to you on is strictly a

statement made by one of the [824] people that were there, by a person that is allegedly suffering from toxic psychosis and I ask you based on these statements he gave are you still of the opinion at the time of the commission of the crime this man was suffering from a toxic psychosis and I think this is evidence, Doctor, I think you should consider this before reaching your decition, [sic] should you not?

A. Yes.

Q. And then he goes on a little while later, this other fellow went into the kitchen and got a can of lighter fluid and poured it on Fran from her right breast to her pussy and then he lit the lighter fluid. Now Doctor, how would an individual if he didn't know if he was not in his right mind, if he didn't intend what he was doing, if he was suffering from this so-called toxic psychosis, how would he know that the other person put it on her, put it on her right breast down to her vaginal area. I mean that is somewhat inconsistent, would you not say, Doctor, from someone to be suffering from toxic psychosis and actually know where the lighter fluid, what point on the victim's anatomy it was poured down from.

[825] A. Does it sound as though during the act that he was psychotic at the time or suffering –

Q. I'm talking about at the time.

A. The particular acts, the total acts you are describing certainly sounds like it is a rather bizarre type of thing you may see in a toxic psychosis.

Q. I wish you'd answer my question. My question is if an individual could recall another person or so he says

another person is pouring lighter fluid from the right breast down to the vaginal area and he remembers this two hours later, don't you think that is important evidence to consider that if this individual is suffering from a toxic psychosis?

A. Yes it is.

Q. Would your professional opinion be that of someone, if someone can talk with this type of accuracy that more probably than not he was not suffering from a psychosis?

A. Right.

Q. Doctor, I can go on and on, where it talks about the woman bobbing up and down in the bathtub and where it talks about where he went to drink. Now Doctor, I think this would be considered an important piece of paper that wasn't given to you by Mr. Weidner, his statement. He said me and [826] Cindy started drinking about 9:30 p.m. the night before. I had one draft beer, about five slugs from a bottle of wine, five shots of Jack Daniels and about ten beers. My question again, was it, in what point did this man become so totally inebriated, toxic psychosis took affect and caused him to use the intent to commit such heinous acts that he committed.

A. I don't know.

Q. So basically, Doctor, and I do appreciate your testimony, is it your opinion as to whether or not the Defendant was suffering from a psychosis is strictly based on the limited hypothet given to you by Mr. Weidner and it didn't take into consideration the statement of the Defendant or anyone else or any letters

written by the Defendant or any other information that may have been pertinent and important to you to arrive at your opinion.

A. No sir.

MR. BOUDOUSQUE:

I have no further questions

REDIRECT EXAMINATION

MR. WEIDNER:

Q. Doctor, you are correct, I did not provide you with a statement and I did not provide you with any other information. What I had [827] done was ask you a question and you gave me an answer, is that correct?

A. That is correct.

Q. Now here is this entire statement that Mr. Sawyer gave to the police. I believe you also stated in response to questions by Mr. Boudousque that you have now had an opportunity to review police reports and other information.

A. Not carefully, I must say, just briefly.

Q. But you have been able to briefly go over them?

A. I would say very brief. That was right prior to coming in here.

Q. Would you like to review that statement at this time?

A. (The witness complies.)

Q. You have had a chance to review that?

A. I read most of it right before I came in here.

Q. Now added information you have with that statement and the brief review of the police report and other stuff to the information I gave you on the hypothet, does that change your opinion?

A. It doesn't.

Q. You describe bizarre behavior, the incidents occurred that are described in that statement, would you consider them bizarre behavior?

A. Yes sir. I would say a person – One important [828] thing I didn't mention in all this, of course, I may have, I am not sure, a person suffering with a toxic psychoses acts more on his impulses. In other words, he has no or he has less control of his impulses. That will vary depending on the toxic state that particular individual is in and he will have various thoughts that will come into his mind. He will have less control over his actions on those thoughts in a toxic psychosis and usually that is what leads to a lot of bizarre behavior. The manifestation of the personality of the individual will determine to what extent the actions he might take in his toxic state.

Q. The behavior described in there is consistent with bizarre behavior, consistent with a psychosis.

A. Yes sir I would say so.

MR. WEIDNER:

I have no further questions.

RECROSS EXAMINATION

MR. BOUDOUSQUE:

Q. What is a social-pathic personality?

A. Usually we describe these individuals as the type of person who the most common thing is they constantly are in trouble with the [829] law. They usually show very little in the way of affect which is something we try to measure by our clinical evaluation.

Q. They know what they do but they don't give a damn one way or the other in terms of society, is that correct, Doctor?

A. Yes sir. They do know right from wrong.

Q. They don't have basically what we would know as a conscience. There type of people, these type of people could inflict as much misery, suffering and agony on other people and not affect them.

A. In varying degrees.

Q. You have stated people like this, I've read some psychology books and I think they tried to describe people like Adof [sic] Hitler, people could commit horror. They are somewhat of an antisocial personality, do you not think.

A. I don't what [sic] to comment on Goering and Hitler.

Q. Frankly so I withdraw it but basically, Doctor, there are people?

A. We see them all the time, yes sir.

Q. You do see them all the time?

A. Yes.

Q. And basically that is a manic personality, they just do not care about the morals or about the principles that dictates society. They don't want to live within the realm [830] of society, correct?

A. Well to put it another way you get from society as much as you can without input.

Q. In terms of what gratifies them without the consequences.

A. That's correct.

Q. Have you had the occasion to talk to Doctor Arneson about Robert Sawyer?

A. We have discussed it at various times.

Q. Are you aware she considers him somewhat of an antisocial person?

A. Yes

Q. Do you also consider him?

A. I don't have any, I can't remember exactly my history but I would think that it is in various degrees and of course he has a history of drinking quite a bit and wandering around and not having a stable kind of life or whatever.

Q. So basically, Doctor, would you not say it is more probable than not that it would take a sociopathic personality to commit such a horrendous crime.

A. I would think it would be more likely but let me say this. Other types of individuals and people with mental disorders could commit such a crime.

Q. But you did not diagnose Robert Sawyer as having a mental disorder.

[831] A. No.

Q. Of that type?

A. No.

Q. Doctor, what is a sadist?

A. It is an individual who inflicts and enjoys inflicting pain on others.

Q. There are such people are there not?

A. Yes sir.

Q. Would a sadist also be considered an antisocial?

A. They may. They may or may not. You, know, people may manifest various symptoms, you know, and not necessarily could be very sadistic and not necessarily be antisocial.

Q. I want to read you a statement from Doctor Arneson and answer me if you would agree with this. What is a sociopathic personality. This is a personality you frequently find in prison settings. These individuals have great problems in superego, by that I mean conducting themselves by rules of society. They are usually very impulsive. They do what they feel like doing. They have low frustration tolerance, no guilt or feelings of guilt. If they do perform some act which is in opposition to society or this type of thing. Would you agree with that?

A. Yes sir.

[832] Q. From studying or from your clinical interview with Robert Sawyer, would you say he has a super-ego. Have you discussed that fact?

A. No I haven't discussed that particular fact but when you are talking about a sociopathic personality you are talking about super-ego. What we talk about is super-ego equini (spelled phonetically). It doesn't establish someone, someone does not have a super-ego when we talk about the super-ego – Like a squeegee, it has a lot of holes in it and therefore I think it is very important to understand.

Q. Doctor, I'm out of my realm of expertise.

MR. WEIDNER:

Allow the Doctor to explain his answer.

MR. BOUDOUSQUE:

I would like to withdraw my question and there will [sic] no need for an answer.

MR. BOUDOUSQUE:

Q. Doctor, my point, are there not such people that can commit such bizarre circumstances as Robert Sawyer has been accused of committing and in fact enjoy inflicting this type of pain and suffering on another person.

A. Yes sir.

[833] Q. In fact aren't there such people that when they do these type of acts they get certain types of sexual gratification although they may not have any physical

activity, any physical active intercourse but by inflicting and degrading and dehumanizing another person they can have some type of orgasmic feelings.

A. Yes sir, that is correct.

Q. Doctor, isn't it possible that this is basically or could have happened in this circumstance?

A. I would rather you give me a hypothet. It is possible. I think it is possible.

Q. Doctor, anything is possible.

A. Yes.

MR. BOUDOUSQUE:

I have no further questions.

MR. WEIDNER:

Q. Doctor, the District Attorney talked to you about sociopathic personality. A person who has a sociopathic personality, are they able to form intent to do their acts in the normal way that a normal average person would form and intent?

MR. BOUDOUSQUE:

I object to that. What a normal person would form intent and the way a sociopathic forms intent, actively desires [834] the prescribed consequences, that is intent. I can't see how you can have one person having one criteria in intent and another individual having another.

THE COURT:

Did you finish?

MR. WEIDNER:

Q. Doctor, a person who has a sociopathic personality are they able to form intent or active desires to have things happen like the average person in the courtroom would be able to form it who was not a sociopathic personality.

MR. BOUDOUSQUE:

My only objection is he able to form intent, that is the issue, not whether he is able to form intent like a normal person. Normal people I don't think would have the intent. What I'm trying to say, Your Honor, that intent is the same and you should not delineate between someone that has a basic personality, that is different from another individual.

THE COURT:

Would you care to comment on those remarks.

THE WITNESS:

Well as I understand it you are asking me can a sociopathic personality form an [835] intent as a normal person would form an intent, is that correct?

MR. WEIDNER:

Q. That's right.

A. First of all yes they can form an intent. A normal person can form an intent to do something as well as a sociopathic personality could form an intent to do something but what we see in sociopathic individuals would

form different types of intent than that of a normal person. The things they do are different than what a normal person would do. If I explained myself correctly.

Q. In other words they can on some level they will intend what they are doing but it may be a different level.

A. No it has nothing to do with the levels. It depends on the type when you talk about intent, you are talking about behavior. That's what you are talking about in terms of intent. Normal individuals, their goals are different from what a sociopathic individual's goals may be. His goals is perhaps to rob a bank and get away with it whereas a normal person would want to become a car salesman. Did I make that question clear?

Q. If a person is a sociopathic personality, does [836] he understand what he is doing?

A. Yes sir.

MR. WEIDNER:

I have no further questions.

MR. BOUDOUSQUE:

Thank you, Doctor. We will introduce this joint motion as State and Defense-4.

MR. WEIDNER:

I call Glenda White.

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[870] DR. GENEVIEVE A. ARNESON, 1011 Fourth Street, Gretna, Louisiana, was called as a witness by Counsel for the Defense and after first being duly sworn, was examined and testified as follows:

VOIR DIRE EXAMINATION

MR. WEIDNER:

Q. Doctor Arneson, what is your occupation?

A. I am a medical doctor, specializing in psychiatry.

Q. How long have you been doing that?

A. Twenty-two years.

MR. BOUDOUSQUE:

I will stipulate as to her qualifications as an expert in the field of psychiatry.

DIRECT EXAMINATION

MR. WEIDNER:

I will accept that stipulation.

MR. WEIDNER:

Q. Now Doctor, in connection with your acting as a psychiatrist, do you do much work with Jefferson Parish court system?

A. Yes.

Q. In what connection do you do that work?

A. Well I frequently am appointed by the Court for examining prisoners relative to sanity hearings or sometimes the Court just wants a psychiatric evaluation. I am also assistant coroner of Jefferson Parish and do a lot of work in terms of civil commitments of mental patients.

Q. Doctor, how many people, can you give me a rough figure of [871] how many people you think you have examined that are charged with criminal offenses?

A. I'd say over a thousand.

Q. And how many years have you been doing this?

A. Since 1965.

Q. Doctor, in connection with your various jobs and in connection with Jefferson Parish, have you examined one Robert Sawyer?

A. Yes.

Q. I show you a medical report that is dated June 9, 1980. Would you read that?

A. (The witness complies).

Q. Is that a report you wrote on Robert Sawyer?

A. Yes.

Q. Was this medical report derived from a clinical evaluation conducted of Robert Sawyer?

A. Yes.

Q. Could you tell me what your psychiatric impression of Mr. Robert Sawyer was at the time you made the examination.

A. This examination was done June 2nd, 1980 and my psychiatric impression following the exam, there was no evidence of psychosis. No gross abnormalities in the mental status at this time. Probable sociopathic personality. In my opinion the subject would be considered legally sane and mentally competent to stand trial at this time. From the subject's description he was intoxicated on wine at the time of the alleged offense and therefore it is probable [872] that he has a toxic amnesia for the details of the alleged offense. In the body of the motion to appoint a sanity commission it is mentioned that a brain scan test should be included which would enable medical experts to determine lack of mental capacity or the extent of mental capacity for the following grounds. It should be noted that this type of test would not give the information that is desired.

Q. Doctor, also in connection at the time you made this first psychiatric examination of Robert Sawyer, did you have in your possession when you made this examination any police reports, documentation or any other information in connection with the crime of which he was charged?

A. No.

Q. Since you have made this examination have you had an opportunity to review all the other documentation?

A. Yes.

Q. Have you been able to review in depth.

A. Fairly well.

Q. So you have a fairly good working knowledge of what happened in this particular incident?

A. Yes.

Q. Doctor, I would like to put a hypothet to you. This is taken from testimony which has been given in the Court today.

MR. BOUDOUSQUE:

I object to that statement. A hypothet by its very nature is not taken from the testimony. It is a [873] hypothet and nothing more than that I think the testimony what was testified to the jury heard that and they should know I don't think his hypothet arises from the testimony.

THE COURT:

Ask the question.

MR. WEIDNER:

Q. Doctor, approximately eight o'clock one evening Mr. Sawyer and Cynthia Shano go out to various bars or they leave and go out to bars and they begin drinking.

MR. BOUDOUSQUE:

I would ask that the hypothet if it's going to be a hypothetical by its very nature does not come from a fact finding situation. A hypothet is a hypothetical situation, it doesn't exist to say. It is a hypothet and described the exact same terms or what is supposed to be the testimony is inconsistent.

THE COURT:

Ask the question.

MR. WEIDNER:

Q. They leave approximately 8:00 p.m. They go to various bars, they begin drinking wine, wine is drank, whiskey, beer. I believe it is MD 20/20 wine. Mr. Sawyer at least drinks continually all night, arrives at home approximately 7:00 or 7:30 a.m. At that time he is described as staggering, bearly able to walk, knocked down, continues drinking MD 20/20 wine and then I believe from your review of the reports and all you are aware of the incidents which occurred [874] during the next, sometime during the next four hour period.

A. I read what witnesses reported.

Q. Incorporating that into it approximately 1:00 to 1:30 p.m. in the afternoon he is described by a witness as being glassy-eyed and appeared to be in a stupor. From those facts your prior examination of Mr. Sawyer and those facts given are you able to render an opinion on Mr. Sawyer's mental condition during this period of time?

A. Yes.

Q. Would you give us that opinion?

A. Well it is my opinion if Mr. Sawyer drank that much alcohol and his behavior towards the victim is a described by witnesses –

Q. Speak up.

A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim is as described by witnesses,

if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, then it would be my opinion that he was, he was psychotic and it was a toxic psychosis secondary to the alcohol.

Q. Doctor, when a person is in a toxic psychosis are they able to form intent?

A. No, not in the usual sense.

Q. Doctor, I'm sorry, can a person be suffering from a toxic psychosis at one point, this earlier point in time [875] we are talking about and then be able to respond to a command, told, you know, what happened, point and shake his head.

A. You mean when a person is in a toxic psychosis will they respond to a command. Yes they can be or they can't. I wouldn't be able to predict that.

Q. Would they be able to recall the events that occurred during the psychosis?

A. Most of them report amnesia for that period. Some have patches of memory like in a dream, nightmare.

Q. I show you a document that has been submitted in evidence and tell me if you had a chance to review it before. It's Robert Sawyer's statement given to police officers for Gretna at 4:01 p.m.

A. Yes.

Q. On the 20th of September. Have you had a chance to review that?

A. Yes.

Q. Would a man be able to give a statement and do something like that, would that be consistent with toxic psychosis.

A. You mean at the time he is answering these questions.

Q. No I mean if he had suffered that in the morning during the time the incidents were occurring.

A. Yeah but after he sobers up and detoxifies the brain, yes he is no longer toxic. He has been detoxified.

Q. He would be able to give a statement such as that?

A. Yes.

Q. Would the incident he described in the statement be [976] consistent with the psychosis.

A. I don't really know, know exactly what you are driving at there. His answers to the questions seems to be fairly straightforward and gives his version of what happened, his version of the events.

Q. Doctor, psychosis does it involve bizarre behavior?

A. Doesn't.

Q. Does it.

A. Yes, usually.

Q. Would the bizarre incidents that are described in this, would that be consistent with being in a psychosis at the time these incidents occurred?

A. Yes. The behavior is so monstrous and so inappropriate it seemed it would have a psychotic degree if this is true.

MR. WEIDNER:

Thank you Doctor. I have no further questions.

CROSS EXAMINATION

MR. BOUDOUSQUE:

Q. Doctor Arneson, when did you have the first occasion to examine the defendant?

A. June 2nd at the Parish Prison, 1980.

Q. How long was the extent of your interview?

A. I didn't time it. They are usually around thirty minutes.

Q. About thirty minutes.

A. Uh-huh.

Q. Did you have the occasion to discuss you findings with Doctor DeVillier. Did you have the occasion to discuss your findings of your report with Doctor [877] DeVillier?

A. Before the sanity hearing?

Q. Before your wrote your report?

A. No. He usually said I thought he was okay and I said yes I thought he was okay and that's what we are referring to his sanity and his mental compentency which is why I was examining him at that time.

Q. You didn't corroborate or correlate as to give any input as to see what your evaluations are, to see if they are correct at the time you examined him. You stated there was no evidence of psychosis, no gross abnormalities and mental status at this time –

A. Yes.

Q. And that he was probably a sociopathic personality. What is a sociopathic?

A. A sociopathic personality is an individual who has for whatever reason, we really don't know why they have difficulties incorporating a super ego consciousness and they are, they will do anything without any feeling of guilt or remorse, do whatever they think they can get away with. Many of them are involved in criminal activity if they are not of good intelligence. If they are of good intelligence they are frequently very successful in business or law.

Q. What would you consider good intelligence?

A. Well I would say intelligence above average. You want a number?

Q. No. I don't want a number. I want to go into something [878] else. It says you testified at a hearing in this Court on June the 12th, 1980. We asked what a sociopathic personality was and you said these individuals have great problems in terms of superego, by that I mean conducting themselves according to the rules of society. They are usually very impulsive to which they do what they feel like doing. They have low frustration tolerances, no guilt or feelings of guilt. If they do perform

some act that is in opposition to society, that type of thing, that would be an accurate statement?

A. Yes.

Q. What you are saying a sociopathic personality, an individual who has this type of personality, has no conscience as the normal individual might know it to be conscience.

A. Right.

Q. They do intend the results of their actions and they do frequently know what they are doing, do they not?

A. Yes.

Q. They do intend the results of their actions and they do frequently know what they are doing, do they not?

A. Yes.

Q. Most criminals who commit crimes, commit crimes with the intent to commit their criminal intent?

A. Sociopathic personalities might plan a very successful bank robbery.

Q. And there are some people that just act on instinct because something they are souped up at the time and they act regardless of how it may affect the lives of another individual, correct?

A. Well I wouldn't associate that necessarily with a [879] sociopathic personality. They are very usually well aware of what is right or wrong but they will not respect if they think they can get away with it.

Q. It doesn't matter what they do to another person or how their actions affect other people's lives. They are not concerned about the pain or suffering.

A. They have very little guilt, yes.

Q. But they do intend what they do if someone goes out and pulls a gun and if he feels like blowing another person's brains away so a person wouldn't be a witness against him that happens, you've examined people like this?

A. Yes.

Q. Would you consider these people suffering from an antisocial personality?

A. Uh-huh.

Q. They intend to cock the gun and pull the trigger.

A. If it's for their benefit, yes.

Q. Doctor, what is a sadist?

A. A sadist is a person who gets sexual pleasure or satisfaction from torturing or making other people suffer pain.

Q. A sadist feeds his ego, does he not, to degrade and to dehumanize another person, is that correct. He has a sense of superiority.

A. That's controversial. It is known that sometimes inflicting pain and torture on another person is somehow tied up with sexual satisfaction in these very warped individuals.

[880] Q. He knows what he is doing. Obviously anybody who commits that type of crime would not be

what we consider normal, may be considered warped, but they intend the results of their actions.

A. Certainly because it brings them gratification.

Q. Sure. Now when you say that the defendant was suffering from toxic psychosis. I'm sorry, toxic amnesia, you are saying maybe he didn't remember all the things that took place because of the amount of alcohol he drank?

A. Yes. Many times substances will impair the brain so that events are simply not recorded.

Q. When did you have the first occasion to review the statement of Robert Sawyer?

A. I think it was this afternoon.

Q. Just this afternoon? Is it not a fact, Doctor, that you had already reached a conclusion from previous conversations with Mr. Weidner before you evaluated that report, more than likely the defendant suffered from toxic psychosis?

A. Yes.

MR. WEIDNER:

I object to the implication. He is trying to imply we got together and decided what her opinion was.

THE COURT:

The Court overrules that. That wasn't the question. The question was had she arrived at that conclusion prior to reading that report.

[881] MR. WEIDNER:

My objection is to the implication.

MR. BOUDOUSQUE:

The jury can decide.

THE COURT:

You can answer that question.

THE WITNESS:

I answered it.

MR. BOUDOUSQUE:

Q. You answered that you had already arrived at the opinion based on evidence given to you by Mr. Weidner that this man probably suffered from a toxic psychosis.

A. Yes because most of it was because most of it was because of reading some of the court reports by the police.

Q. You read the police reports?

A. Yes.

Q. Did anything in that police report indicate in detail the actions of the defendant during the time he was allegedly suffering from toxic psychosis?

A. The thing that struck me was the fact he was just sitting there not making any effort to escape or make any kind of apparent escape, unaware of his situation.

Q. Doctor, that's true. You are of the opinion he made no effort to escape and he did not move, correct?

A. This is what the policemen said, he was simply sitting there in the room.

Q. If I were to tell you prior to that policeman coming, that a man by the name of Thomas Champagne in so many uncertain terms told the defendant, Tommy [882] Champagne, he had a long chain in his hand and a chain wrapped around his hand and in no uncertain terms he told the defendant if you get out and you come out I'm going to give you exactly what you gave to Frances. Would that change your opinion as to why he did not move?

A. It might but not necessarily.

Q. What do you mean by not necessarily Doctor. Why wouldn't it change. I get the impression that part of your diagnosis is that he didn't move because he was in such a stupor he couldn't move but if I were to tell you he responded to all the commands, the facts indicated that he was understanding of the events around him, he was told in so many uncertain terms he'd better not leave until the police come, that wouldn't change your opinion.

A. Well I would like to have more of a description of what he was looking at.

Q. Doctor, is it not a fact no matter what I tell you at this point in time it wouldn't change your opinion because you have already been committed to that opinion?

A. No I'm not committed to an opinion. I am simply giving my medical opinion. I have no position in this at all.

Q. Did you have the occasion to review any one of these numerous letters that were written by the defendant that would give you any type of indication relating to what his actions were?

A. No I didn't see any of those letters.

Q. Don't you think you would have liked to see those letters [883] before you made an evaluation?

A I don't think so.

Q When is the first time that you really sat down in detail with Mr. Weidner and started discussing this case?

A Well we have been sort of, you know, in the hall because I have overheard a good bit.

Q Well often, have we discussed this case, the only time I can recall.

A You've called me on the phone a couple of times. I returned your calls but I never could find you in. Mr. Weidner and I discussed it last Friday.

Q Where did you discuss it at, Doctor?

A Over at the mental health center.

Q That is where you had lunch with Mr. Weidner?

A We had lunch and after he brought me some of the materials to read.

Q You didn't discuss any of the topics of what your testimony would be at your luncheon?

A Yes.

Q So that is when you began talking about it at lunch. Has Mr. Weidner ever represented you in the past for any civil actions?

MR. WEIDNER:

I object to that.

MR. BOUDOUSQUE:

It would show an obvious interest and possibly bias.

THE COURT:

[884] The Court overrules that. You can answer that.

THE WITNESS:

Yes.

MR. BOUDOUSQUE:

Q On how many occasions have you used the legal services of Mr. Weidner?

A One time and he is also, a while back, attempted to collect fees for me.

Q Would you consider him a friend?

A Well yes.

Q Now Doctor, is it not a fact that basically what you are trying to do is give an educated guess about something there is no way for sure you could know what happened?

A Yes. There is no way I could know for sure because I was not there.

Q And a lot of your opinion is based on the hypothet that was given to you by Mr. Weidner. Basically you

drew your conclusion from the facts given to you by Mr. Weidner. He is the one that gave it to you.

A Right. Some of the things I read as I said before this in the police report.

Q But basically your source of information as it relates to this case was provided to you by the defense attorney?

A His hypothetical question.

Q But he was the one that was supplying you with most of the information, was he not?

A Well this is hypothetical.

Q Doctor, I wish you would quit being evasive. Was most of [885] the information you got related to this case given to you by the defense lawyer?

A Yes.

Q And is it not that people can slant things in different fashions, can they not?

A Certainly.

Q I am not accusing Mr. Weidner slanting anything obviously. Obviously he is very competent and a friend of mine. If I was advocating a position to you I would be advocating it differently than a defense lawyer.

A Right.

Q What information besides what Mr. Weidner has given you did you have at your grasp when you made this decision?

A I had a copy of the police report. I had some information regarding description of what went on from witnesses.

Q Did you ever read the statement of one Cynthia Shano?

A No.

Q Did you ever read a statement by a Charles Lane?

A I believe I did.

Q You read that statement?

A Yes.

Q But you didn't read the statement of Robert Sawyer?

A Yes. Is that what you were showing me.

Q Prior to you making up your mind, I'm not talking about now, you made up your mind weeks ago, at least last week. You didn't read Robert Sawyer's statement before you made up your mind?

A Well it wasn't necessary.

Q You don't think that what a man says that he did

[886] A Four hours later.

Q This is two hours after it happened and two hours is a whole lot better than ten months after the commission of an offense, don't you think Doctor?

A (The witness did not respond.)

Q Answer me if you would Doctor.

A Would you repeat the question.

Q My question is don't you think a statement of a man as to what he was doing or what he said he was doing two hours after the commission of a crime –

MR. WEIDNER:

Objection. That is absolutely contrary to all the facts. The statement was given at four o'clock. The factual testimony is that that incident occurred either between 7:30 and 8:00 o'clock in the morning or sometime up until about 12:30 or 1:00 in the afternoon.

MR. BOUDOUSQUE:

Your Honor, that matters not.

MR. WEIDNER:

Your Honor, it matters to me and I am objecting.

THE COURT:

Rephrase the question.

MR. BOUDOUSQUE:

Q It doesn't matter because whether it was given two hours after the incident, Doctor, or after four hours after the incident, something that a man said he did and what he can recall as to certain factual events that he said that he did, don't you think that [887] would be very important information that you would want to consider.

A Well when I read that this afternoon it was apparent to me the man had sobered up or had been detoxified.

Q Do you remember talking to me in the attorney-client room right before your testimony.

A Yes.

Q Do you recall if I asked you if you had read the statement of Robert Sawyer?

A Yes.

Q And did you not indicate to me at that time that you had not read the statement of Robert Sawyer?

A I may have looked it over but I didn't read it.

Q Doctor, answer my question. Did you not tell me you didn't read this statement about twenty minutes before Doctor DeVillier took the stand?

A That is when I read it.

Q After Doctor DeVillier got off the stand.

A . No, when we were in the attorney-client room and you showed it to me.

Q I never showed you this statement.

A Where did it come from. I don't remember. I did see it.

Q But did you read it.

A I thought you showed it to me. I didn't have time to read it at all but I am looking at it right now. As I said it looks like a fairly straightforward description by the defendant of his version of what happened.

Q Now Doctor, one of the things he says, me and Cindy started [888] drinking about 9:30 p.m. I had one

draft beer, about five slugs of a bottle of wine, a shot of Jack Daniels and about ten beers. Can you tell me was it the first draft beer, was it the five slugs he had from the bottle of wine or was it at the time he had the Jack Daniels in conjunction with the other dri[illegible] that he started to commit these toxic psychotic type of actions.

A I wouldn't know.

Q Well Doctor, you are stating an opinion that he had to at one point in time.

A There is a great difference. Some people have a great tolerance for alcohol. Some people have a little tolerance for alcohol.

Q Did you ever question Robert Sawyer as to his tolerance to consume alcohol?

A No.

Q Don't you think an important factor in your decision as to whether or not he is suffering from some type of toxic psychosis is how alcohol acted medically and mentally to this man?

A Yeah I did. He told me at the time of the examination, at the time of the alleged offense he was inebriated, drunk with a cheap wine called Mad Dog 20/20 and he states that will make you crazy.

Q So that will make him crazy, right Doctor. That's what he told you.

A Yes.

Q Doctor, when an individual has toxic psychosis, is [889] hallucinations or delusions part of that?

A Frequently they have visual hallucinations or mental distortion.

Q Frequently?

A Yes.

Q What you read from the time you first interviewed the defendant, did he give you any evidence he was suffering from any type of delusions or hallucinations?

A He probably wouldn't recall that. You see, if people have distortions of faces or undergo changes and some people get very frightened and will strike out at an individual in a very inappropriate and psychotic manner.

Q Doctor, isn't it possible that an individual with an antisocial personality, an individual that has no conscience as far as he is concerned, it doesn't matter as long as it gratifies him. It's possible for these people to have intent, is it not?

A Well in the first place I don't know if Robert Sawyer is a sociopathic personality.

Q Please answer my question.

A Of a sociopathic nature.

Q You are saying now you don't know.

A I never said he was. I said probable.

Q Probable is more likely than not.

A That's what the word means.

Q That's what we are getting into. You are of the opinion he probably has this type of personality.

A Yes but I would have to have lots more information about [890] his early upbringing and his interpersonal relationship to make that diagnosis definitely.

Q A person who is psychotic, Doctor, they have intensity, like we talked about, the man who was going to commit the murder. He knows what he wants to do, right?

A If they are psychotic. They may have intent but it may be based on delusions or hallucinations.

Q Doctor, did you not say in my hypothetical example if somebody was going out and robbing someone and kill them just because they didn't want them to testify that person probably had an antisocial personality and he was doing that for his own ends and he had no conscience and he knew what he was doing.

A Right. It was for his benefit.

Q So if a person did drink at the same time, okay, that he went out and committed those acts, his basic personality was such that he intended the prescribed criminal consequences and the alcohol didn't have anything to do with it.

A No I don't believe that.

Q You don't believe that.

A I don't believe that somebody is that toxic to the point of psychosis with alcohol can form intent in terms that you are talking about and say ah-hah, I'm going to do this.

Q Let's say Doctor, he is not suffering from toxic psychosis. You are saying possibly he is suffering from

toxic psychosis from the information supplied to you by Mr. [891] Weidner on a limited situation. You stated in your report the man is probably of an antisocial personality.

A Probably.

Q If he was suffering from an antisocial personality, alcohol would do nothing but peak his emotion, is that a possibility, to magnify, to intensify the feeling he already has as a part of his personality?

A He can do that.

Q It can.

A Common sense, the emotional state, the person is in, yes, but not to the point of psychosis.

Q Doctor, you only have arrived at the decision he was suffering from psychosis based on a limited hypothetical situation given to you by Mr. Weidner putting aside that limited hypothet.

A I thought there were witnesses that saw him extremely intoxicated.

Q Doctor, there are witnesses that have a lot of conflicting statements. If I were to tell you four policemen who are certified in conducting field sobriety tests –

MR. WEIDNER:

I object to that. People are certified.

THE COURT:

Put it in the form of a hypothet.

MR. BOUDOUSQUE:

Q Hypothetically, Doctor, if I were to tell you there were four policemen or three policemen who observed the [892] defendant from the time, right after this heinous act had occurred and they were of the opinion based on their many years of experience, based on seeing inebriated people, drunk people, that he didn't talk in a stupor, didn't walk in a staggering state, he was coherent, that he understood exactly everything that was said, that he appeared to have been drinking but he was not intoxicated to where he was not boxed out of his mind, that he showed signs of coordination. That he understood everything that was being asked, that he had a normal speech pattern, all the things that these people are trained to look for, if I were to tell you in their opinion he wasn't intoxicated, would that change yours?

A Well certainly if these were reputable observers. If he had a blood alcohol level and he had one of these breathing intoximeters or such as that –

MR. BOUDOUSQUE:

I have no further questions.

REDIRECT EXAMINATION

MR. WEIDNER:

Q Doctor, during the course of our discussions about your opinion, medical opinion on Mr. Sawyer, have I ever attempted to influence your opinion?

A No.

MR. BOUDOUSQUE:

Your Honor, I have never intimated that. At no time did I ever intimate that Mr. Weidner has [893] distorted the facts or tried to influence this doctor's opinion. My only statement was that people advocate things in different ways.

MR. WEIDNER:

Q Doctor, you said the first time you saw Mr. Sawyer's statement was sometime this afternoon?

A (The witness nods affirmatively.)

Q You had a chance at that time to read it?

A I just glanced over it. I didn't read it all in great detail.

Q Prior to that you had plenty of information about Mr. Sawyer and about the incident had occurred?

A Yes.

Q You formed an opinion?

A Yes.

Q When you finally had the chance to see the statement he had given to the police, and seen it and been able to go over it, has that changed your opinion?

A No.

MR. WEIDNER:

Thank you doctor.

MR. WEIDNER:

Q Doctor, the same policemen Mr. Boudousque was talking about that says Mr. Sawyer was not intoxicated, if I told you those same policemen on an arrest register which has the defendant as being moderately intoxicated, all of them deny putting that on the arrest register although it is there and also that even though there is information that the police was [894] told Mr. Sawyer had been drinking heavily, when this incident occurred, that has been denied also –

MR. BOUDOUSQUE:

Objection. He is arguing.

THE COURT:

Is this a question.

MR. WEIDNER:

This is going to be a question.

MR. WEIDNER:

Q Knowing that these policemen who Mr. Boudousque said, would that change your opinion that they are four credible people who told you Mr. Sawyer was sober, knowing these same four credible people have all denied the moderate intoxicated on the arrest report and all denied the press reports of the defendant having drank heavily, would that change your opinion.

A It would make me wonder about them, yes.

MR. WEIDNER:

I have no further questions. Your Honor, the defense rest.

MR. BOUDOUSQUE:

I have no rebuttal.

(Recess for the day at 8:15 p.m.)

[941] PETER THOMAS, Little Rock, Arkansas, was called as a witness by Counsel for the State and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. BOUDOUSQUE:

Q Mr. Thomas, what is your occupation?

A Deputy Prosecuting Attorney for the Sixth District of Little Rock Arkansas.

Q What city?

A Little Rock, Arkansas.

Q How long have you been so employed?

A Approximately a year and ten months.

Q I'm going to ask that you look at State Penalty 1. Can you identify that document and if so how?

A Yes. State's Penalty 1 consists of four pages. The first page would be a certificate of authentication according to the Acts of Congress dealing with the last three pages. The second page is a felony information file by the prosecutor of the Sixth Judicial District in Little Rock charging Robert W. Sawyer with murder in the second degree. The third page is a judgment concerning that case and the fourth page is a commitment to the Department of Corrections of Arkansas.

Q Now-I am going to show you State's exhibit 2. Can you identify this document and if so how?

A State's Exhibit 2 is what we refer to as a Pen Packet. This is what the prosecutors in Arkansas request

from the State Penitentiary dealing with commitments [942] to the Arkansas State Penitentiary.

Q These documents, how were they procured?

A Well State's Exhibit 1 was procured by myself at your request. I went to the Circuit Clerk in the Sixth Judicial District and requested certified copies of the information, judgment, and commitment to the Arkansas State Department of Corrections.

Q State Penalty 2.

A State Penalty 2 was requested by me from the Arkansas Department of Corrections and sent to me here today.

Q Would you read that felony information. What is the bill of information?

A Well in the Sixth Judicial District generally people are charged on a prosecutorial information. I as the prosecuting attorney, as the moving force, this was not based on a Grand Jury Indictment –

Q Do you use the Grand Jury much in Arkansas?

A Very seldom.

Q Would you read that felony information.

A State of Arkansas versus Robert W. Sawyer. It was filed January 2, 1974. Felony information. Lee A. Munson, Prosecuting Attorney of the Sixth Judicial District of Arkansas, in the name, by the authority, and on behalf of the State of Arkansas charges Robert W. Sawyer with the crime of violating Arkansas Statutes A and N. 41-2206, murder in second degree, committed as follows,

to wit: The said defendant, in Pulaski County, Arkansas, on or about the 4th day of December, 1973, did unlawfully, feloniously, willfully and [943] with malice aforethoughts, assault, kill and murder Laura Durham by then and there striking her with his hand, with an unlawful and felonious intent then there, her, Laura Durham, willfully and maliciously to kill and murder, against the peace and dignity of the State of Arkansas.

Q I ask you to look at State Exhibit 2. How old was Laura Durham?

A State's Exhibit 2.

MR. WEIDNER:

Objection Your Honor.

THE COURT:

Is this in one of the documents?

MR. BOUDOUSQUE:

Q Will you look through State's Exhibit 2.

A Yes.

Q Is there any indication in that document as to the age of Laura Durham?

MR. WEIDNER:

Objection. They have not been properly identified.

MR. BOUDOUSQUE:

Q What is State Exhibit 2?

A State Exhibit 2 is what we went over before being the Pen Pack from Arkansas.

Q Where was that obtained from?

A It was obtained at my request from the Arkansas Department of Corrections.

Q And where was that sent?

[944] A It was sent to me at your office, it arrived today.

MR. BOUDOUSQUE:

Your Honor, at this time I would like to offer, file, and introduce into evidence Exhibit State 2.

MR. WEIDNER:

May I ask some questions in connection with this.

MR. WEIDNER:

Q Mr. Thomas, did you participate in any manner in preparing that?

A No sir. This would have been prepared by the Arkansas Department of Corrections.

Q Have you ever seen it before?

A This particular Pen Pack, not before this morning, no sir.

Q Do you have any knowledge of that Pen Pack other than you requesting it.

A Well other than I assumed it existed.

MR. WEIDNER:

That's all the questions I have.

MR. BOUDOUSQUE:

Q Is that prison packet certified according to all certifications of prison packets that are obtained by the District Attorney in Arkansas?

A That's correct. It is certified. These are accurate records of the Arkansas Department of Corrections by the Warden.

Q Is this basically how all prison packets look to the State of Arkansas?

A Basically.

[945] MR. BOUDOUSQUE:

I would like to offer, file, and introduce into evidence –

MR. WEIDNER:

Is it certified according to the Acts of Congress?

THE WITNESS:

No.

MR. BOUDOUSQUE:

The Acts of Congress have to do with Court records and not with prison packets?

THE COURT:

How are they given?

THE WITNESS:

This is a certificate of certification on the top. I, Robert J. Tansy, hereby certify that I am the Warden of the Arkansas Department of Corrections, a penal institution

of the State of Arkansas, situated in the County and State aforesaid, that in legal custody as such officer, are the legal records of persons heretofore to said penal institution, that the photograph, summary, Department of Corrections commitment, release noted attached hereto are copies of the original records of Robert W. Sawyer, A.D.C. Number 65250 a person heretofore committed to the said penal institution, and who served a term of imprisonment therein; that I have compared the foregoing and attached copies of the respective originals now on file in my office and each thereof [946] contained in its full, true, and correct transcript and copies from its originals.

In witness whereof, I have here unto set my hand this 18th day of September, A.D. 1980. Signed R. J. Tansy, Assistant Warden.

MR. WEIDNER:

I object to their introduction.

THE COURT:

The Court is going to overrule the objection.

MR. BOUDOUSQUE:

Q I ask that you look at State Exhibit 2. Would you look through that document please sir. Does anywhere in that document does it indicate the age of the victim of the homicide that Mr. Sawyer had committed?

A Yes sir. There is an indication.

Q And how old was Laura Durham?

A Four years old.

Q Is there any indication from State's Exhibit 1 or State's Exhibit 2 the ultimate conviction of Robert Sawyer, what he was convicted for?

A Yes. That would be contained in the third page of State's Exhibit 1 that is filed as a judgment from Pulaski Circuit Court.

Q What was Robert Sawyer convicted of?

A Involuntary manslaughter.

Q Is there any indication in State's Exhibit 1 or State's Exhibit 2 as to what time he was sentenced to serve?

A He was sentenced to three years to imprisonment at the State Penitentiary.

[947] Q Is there any indication as to how much time he actually served?

A State Exhibit 1.

Q State Exhibit 2?

A I believe there is. Yes in State's Exhibit Number 2 there is a sheet that is headed Status Assignment/Release date record. Inmate name, Robert W. Sawyer. These records indicate on March 22, 1974 he was received from Pulaski County Arkansas and on April the 3rd, 1975 he was paroled from the Arkansas Department of Corrections.

Q He served approximately how much time?

A About a year and ten days.

MR. BOUDOUSQUE:

Your Honor, at this time I would like to offer, file, and introduce State's Exhibit 1 and 2 and ask that they be displayed to the jury.

MR. WEIDNER:

Same objection.

THE COURT:

Same ruling. Do you have any other question.

MR. BOUDOUSQUE:

No Your Honor.

MR. WEIDNER:

No questions.

MR. BOUDOUSQUE:

The State has no further witnesses.

MR. WEIDNER:

The defense would call Glenda White.

[948] GLENDA WHITE, 934 Montclair Road, Pensacola, Florida, was called as a witness by Counsel for the Defendant and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. WEIDNER:

Q Mrs. White, in your previous testimony you told us Robert Sawyer is your brother.

A Yes.

Q Would you at this time tell us what you know of Robert's life growing up and what you know of your brother.

A Well my brother has had a pretty rough life. I guess I have to start back when he was, even before he was born, because I think that played an important part with him. My mother was a very tiny woman and when she was pregnant with Robert and his twin sister she had a very, very difficult pregnancy. She was kept in bed off her feet and almost the whole nine months was pretty hard on her. She was very sick. She had no idea that she was going to have twins at all and when they were born she just never did get over it. She was sick for so long and then the shock of having twins and everything else and when they were four months old my mother shot herself. She killed herself and my daddy never got over it. He hasn't to this day. He never got over it. I don't think he deliberately, knowingly blamed Robert for my mother's death but I think subconsciously he did, therefore, I think he has grown up like he was [949] feeling responsible for it. I was only four years old when it happened and like I said they were four months old and my grandmother, which is my dad's parents was the only one to take care of us and my dad wasn't able to. He just almost went crazy and my grandmother had a nervous breakdown so my dad's sister volunteered to take the little girl an take care of her just until my grandmother, where she could take care of her again and of course, you don't get over a nervous breakdown right away and they had me and Robert to take care of every time when she got to the point she felt like maybe she couldn't handle all three of

us, they went over to my aunt to get my sister every time they would have to go, of course, my aunt would cry and say let me keep her a little while longer. I've gotten attached to her, you know, and you need the extra time to get your own strength back and a whole line of stories. Nonetheless she was left there. She ended up staying there the whole time so that had them separated and of course me separated from her too and that's always bothered both of us, you know. We always wanted our sister with us and we got to visit her, they would come over to visit and they came over there but it's not the same, therefore, he ended up blaming himself for being separated from her as well as my mother's death and so far, my dad, I just don't know. He just seemed to go crazy. He hunted for two years looking for some kind of note from my mother [950] leaving some kind of explanation as to why she had done this but there wasn't anything but, therefore, like I said my sister was gone and it was obvious I wasn't the one that caused it, but to him, Robert was the only one that was left and he took it out on him without meaning to and by that I mean we lived on a farm and Robert was never allowed to do things that everybody else was. We had to work in the fields, you know, hard work. Hard work doesn't hurt anybody but when it's carried to the extreme then I think it goes too far but my granddad was there more of a stability, you know, for a while and then of course we lost him but in the meantime I had left home. I had gotten married so I wasn't there. It was just him left there and my daddy worships his dad and when he was gone he just totally acted like he didn't care for anything or anybody since then and Robert took the rap of it all. He wanted to play

ball and do things like other kids was allowed to do and he wasn't allowed to. We lived about eight miles from town and my dad said Robert asked him if he could play ball and he told him no. No. You've got to work, you've got work to do. You've got work to do and so he ended up like that. My granddaddy had given Robert a real nice calf and a cow, and you know, on the market that is worth good money so my dad told Robert, he said if you will give me your cow and calf I will let you play ball so he wanted to play ball so bad he gave him the cow and calf. [951] This is one example. One instance. So after he gave the cow and calf when time came for his ball games he didn't get a ride out there. In fact he had to work in the field almost until time for the ball game to start and he left and he walked. He was a very little boy. He walked eight miles to get to play ball. When he got back home he got a whipping. When I say whipping, I'm not talking about a spanking like you give a child. My daddy whipped and when he whipped he whipped with whatever was handy. I know. I got a few before I left. I love my daddy and I understand more about it now because I am a lot older. I've had time to be away from there for years and years but at the time I didn't feel like he loved me. I didn't feel like he loved Robert. I felt like he took everything out on us but like I said I was gone and he had to work in the field. He wasn't allowed to play ball. He wasn't allowed to go swimming. He wasn't allowed to go to the movies and do everything that other kids have done. He was isolated out there. There was a little boy that lived up the road that was just about his age and he has come down to our house and my daddy would sit right in front of Robert and he would say the other kid's

name was Gary, he said come on Gary, let's go to the store, you know, or come on Gary, let's go to Memphis with me and get feed, you know, and he would tell Robert, you stay here and keep the cows from getting out in the road. There was a pasture with a fence with a pond in [952] it that they could graze in but no, they had to stay out in the open yard there and he had to stay out in the hot sun to make sure they didn't get in the road. He told Gary, come on Gary let's go to the movies, carried that other kid to the movie and left him standing there to watch the cows and he'd come up with work to do, I'm talking about senseless things, get out there, cut a ditchbank with high grass but it's not bothering anybody. Why did he have to do that, just because by God I said so, just because I said so, give you something to do, keep you out of mischief. So after a while Robert began to take off too, you know, he would like I said, I was gone so he began to run off and everytime he would get brought back he would take off again. He would get brought back and get the devil beat out of him, but he would take off again and he ended up, I don't remember the exact age it was, like fourteen or fifteen because of his running away and this kind of stuck my daddy ended up signing a paper and whether he really knew what it was or not, I don't know, but it ended up they put Robert in the State Mental Hospital for no reason and they gave him drugs. Well, I don't know what they were. I know they kept him where you just sat around and didn't give anybody any trouble. You didn't have any energy to get up and walk around. When he resisted taking those drugs they gave him shock treatments as punishment and he stayed there until he got out to get away and took off from there and

he [953] when to Chicago and he was there on his own for several months and he left from there and he went to my aunt's in Texas and he was there for a while but he ended up coming back home. He wanted to be at home with us and Middleton is where we come from. It is a small town and the police there are not exactly the nicest people you want to know. If you get a little of a reputation everybody knows everybody. If you get a little reputation of running off or coming after you or because there is something they don't like – Robert has been in my house and he has been there the entire day and I know he has been there and I saw him and they would come and knock on the door, come in and slam him up against the wall and start searching him in front of my kids and my kids are there crying and screaming, why are you doing that, and he would say wait until we get outside. Don't do that in front of the kids. Me telling them all the time he hasn't done anything, why are you taking him in. He hasn't been out of the house and they said well we will decide that after we get up there and they wouldn't convict him of anything. It was a constant harassment every time he came around. He couldn't walk in the street. He would be picked up. If he stayed at the house he would be picked up because he was staying at my house and if he wanted, if he tried getting jobs and they would end up causing him to lose his job because when you don't show up you get fired and seventy-two [954] hours is the longest they can keep a person in jail on the suspicion of something, whatever the amount of time, that's what they would keep him. They would turn him loose and well it would end up being just enough time to cause him to lose his job. Maybe that sounds unfair to you but that happened.

So he left. He said there is no way I can make a life around here. He said, you know, I can't even hold down a job because they are constantly harassing me and these are things I've seen carried out with my own eyes. I would tell them again he hasn't done anything, he's not left the house so anyway he said if he went to St. Louis, said maybe if he got somewhere in a different town in a different state away from anybody that didn't know anything about him he could, you know, start life over and meet this girl. He met this girl there and they got married and Robert has a little boy that is ten years old and his wife was real young and I don't know for whatever reason when the baby was seven months old, well let me back track a little bit. When the baby, they were at my dad's when the baby was born and he wasn't very old and they went back to St. Louis because her family lived here and she wanted to go back so they went there and we all worried because we had saw the evidence that Rose wasn't exactly the proper mother to be taking care of a little baby. We were worried about the baby. He would be worried that he would be taken [955] care of and have enough to eat and everything so they came back and the baby was three or four months old or five months old. Yeah, about five months old and when they got back he was just as fat and clean and healthy as he could be. He had been taken care of extremely well and he stayed there with us and it didn't take very long to realize Robert was the one that had taken care of that baby. She didn't make any effort to take care of it at all. She didn't do anything for it. She didn't give it a bath. He's the one that took care of it and when he was seven months old she left and she hasn't been back. She hasn't laid eyes on

the child since. He couldn't take care of it by himself and in order for the baby to have proper care he left it with my grandmother there and again the same thing, he would try to get a job and work and well the police would arrest him to the point he couldn't keep a job so he left again and he ends up having the car wreck. He was in a car wreck and his eye was put out. He was really sick for a while there. Again he was back home and he tried to recouperate and there was just no making it there so, yeah, he has drifted around and been shoved around and gone from job to job and not been very stable but it has not been because he has not tried to make it in Middleton. He wasn't given half a chance unless you are from a real small country town you just don't understand. The police can be very prejudice and it's always bothered him [956] that he didn't have a home and his wife and child together. It's always bothered him and like I said he has always lived – in fact he talked to me about it. He said well I just, I guess I am the reason that dad is the way he is. You know, toward all of us. Since I caused mother to do what she did. He always felt to blame for that and anyhow I think he ended up feeling maybe in some way even though Rose left, maybe in some way he thought it was his fault. He didn't have his own child there with him. He was there, he came to see the baby and even this past summer he and Cindy and her two little boys and Cindy's mother and some man whoever was with them went to my grandmother's up there and he thought that he had a life with Cindy and her children and he wanted to see if he could get Scotty which is his little boy and take care of him and raise him and be a daddy to him the way he is supposed to be. Well he told Scotty to let's give

it a chance, you know, and see if you can like being with me and if not then I will take you back home and Scotty loves his daddy but at the same time all he has ever known is living around my grandmother and me and my dad and stepmother and so he went with him and he came here I think for a while and they went to Texas and Robert was working on the river and of course naturally Scotty would cry, you know, and he was homesick. He wanted to go back to my dad and then Robert felt like if he was given a little bit of time to get used to not being with them [957] maybe he would adjust to being with him. Maybe he could have a life with him so while he was on the river Cindy called my grandmother's and told her that Scotty wanted to come home, you know, so my stepmother went and got him and when I talked to him about slapping Frances, you know, he said that he thought maybe the reason he got scared so bad at her giving that child pills and trying to make her tell what she had biven [sic] him was because finally it sunk in on him he had lost his little boy. He could go visit him but as far as being able to raise him and do things with him it was over with Scotty, Scotty was too old. That was his home to him with my mother and my stepmother and my dad and grandmother. That's his home to him and he said it looked like these two little boys was the only kids he would have and that is why it panicked him so the thought of something happening to that little boy. Robert has never, you know, he has been portrayed here and I guess evidently to you you totally believe he is this cruel ruthless person. That is not true. My brother and I have had a lot of arguments. If you have got brothers and sisters you know you get mad and you have a lot of

arguments. We've had some pretty heavy ones and god knows he has never raised his hand to hit me. He has never threatened me and never abused me in any shape, form or fashion. I was divorced for a long time. I had two little boys. I've never been afraid to leave my kids with Robert to take care of them. Not ever. He [958] has took care of them when I was there, when I wasn't there. He has been there with them totally alone. There has never been no harm that come to them. He always took care of them. I never hesitated to leave them. My little boy, he would push him for hours in a stroller. I've never had any reason to even hesitate to let my children stay with him. Ever. They are big now but at the time, you know, I never had any reason to believe he would hurt one of them, not ever. He has always tried to help other people. It's like that he had it so rough that he tried to reach a hand out to help somebody find a job if he was working at some place and he thought there was half a chance maybe he could help them get on he was willing to help them. He brought them home to share what he had to eat. He has shared the last penny. He has had dogs, he's real partial to German Shepherds. He managed to get one or two along the line and I have seen him take the last penny he had and go buy food for that dog and not eat himself. He has come to my house with people that evidently needed a helping hand. They sure liked they did and he has maybe had a nice shirt. He has give them his good shirt to wear and he would wear the old ones. He has never given me any reason, there is no way I could believe he did the things and if he participated in that that he knew what he was doing. No way. I'm thirty-three years old and I have known him all of his life and I have been around him.

[959] There is no way, there has been a few times when he has been out and I haven't been around him. I've already told you that but he has lived with me, he has been around me and I've never seen what he has done, there is just no way. No way. He is just not a cruel person.

Q Mrs. White, what do you know about that conviction that occurred in Arkansas?

A About Laurie. That was a little girl that he and her mother's name was Gwen. They came to Middleton and stayed a while and they had been to my house, that little girl. I played with her. She would talk to me, you know, and she called Robert Wayne daddy. She hung all over him. It was very obvious. He wasn't mean to that little girl and when this thing with her happened we went to Little Rock and I talked to Gwen. In fact Gwen came to Middleton with Robert Wayne and my grandmother borrowed a hundred dollars to give them to help pay on the funeral and Gwen was with them and I talked to her and my grandmother talked to her and there was no reason for us to feel like he ever mistreated that child. The incident that happened Robert had been carrying that baby to where he had been working as a brick layer. He had been carrying the baby to work with him and she had been playing in the sand-piles, I don't know exactly how long Gwen told me, Gwen told me herself the child's mother told me herself Robert had been taking the baby to work because she was working somewhere else and [960] they didn't have a baby sitter or anybody to watch the kid so he carried her to work with him and she played in the sand while he was there and he saw to her and he was trying to give her breakfast, I believe it was breakfast. She kept playing in the chair slinging the food

and giggling and laughing at him and he was going to be late and he told her, Laurie sit up there and she wouldn't sit up and eat and he jerked the chair up there and he popped her on the shoulder and said sit up and eat.

MR. BOUDOUSQUE:

I have no objections to this testimony. It's all hearsay provided if I have a chance to have the same type of testimony with other hearsay evidence.

THE COURT:

You can ask whatever questions you want.

THE WITNESS:

I am telling you what the child's mother told me also. This is not something I am repeating. He told me this is something the child's mother told me and when we went over there I talked with her family and they said the same thing. They had no hard feelings against him. It was an accident, that the chair fell over and the baby hit its head. Yes, I realize you are saying that I wasn't there. I'm not claiming to be there. I simply told you to begin with this is what the child's mother and her family told me as well as Robert. They had no hard feelings with him after the child died. She came to my grandmother's with [961] him. My grandmother borrowed a hundred dollars and gave it to them to held pay for the funeral for the baby. I guess there has been no reason to think there was anything other than an accident.

MR. WEIDNER:

No further questions.

CROSS EXAMINATION

MR. BOUDOUSQUE:

Q If I were to tell you that I have in my custody the District Attorneys file from Arkansas relating to that conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child, was an abused child, that constantly beaten by your brother, would you believe those six people?

A I have not seen the people. I saw the child with my brother on numerous occasions. I never saw him do anything whatever to abuse the child. Yes if she was acting up he corrected her just like her mother did. I never saw him mistreat the child. I don't know what somebody else said they saw. I know what I seen.

Q I will read to you a hospital report in reference to little Laurie. Four year old white female, Miss Laura Sawyer arrived at the emergency room on December 4, 1973 at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such. The child was unconscious and her movements were decerebrate. The father stated [962] and it goes on to say the child was frail and appeared to be underweight, particularly noted the child had multiple scars on her body, two healed scars on her forehead, healed scars, not fresh scars. A scar the size in the right clavicle, a burn scar, a burn on the child's clavicle. She had a scar across her left instep. Upon questioning the father about the scars across the instep he stated it was because the child having dropped a glass on it but her feet had a big purple callus appearing abrasions. She had

multiple bruises, small bruises on her body. Does that indicate to you from what I have just read to you that this child was receiving the tender loving care that you have stated to this jury your brother gave that child.

A I am telling you I saw my brother give the child love and correction if she needed it. She was not ever beaten in front of me. He had not been with that child all of her life. I don't know what that woman or whoever he got connected with her did to the child. She was a little bitty girl. She was small boned, she was very tiny.

Q Do you recognize your brother's signature?

A Yes I recognize my brother's signature.

Q Do you recognize his initials. Is this his initials there, R.W.S.

A Yes, that's his initials.

MR. WEIDNER:

I have never seen this.

[963] MR. BOUDOUSQUE:

Q Is this his signature right here with his initials?

A That looks like his signature.

Q How often were you around Robert when he was living –

MR. WEIDNER:

I'm objecting to the use of this.

MR. BOUDOUSQUE:

She testified to nothing but hearsay testimony and it was all slanted one way.

THE COURT:

I'm going to sustain that objection.

MR. BOUDOUSQUE:

Q So as far as you are concerned Robert is the type of individual that is meek as a lamb and would never hurt anyone.

A I didn't say he was meek as a lamb sir. I said my brother was not a cruel person. He has never given me any reason to believe he is a cruel person.

Q Do you think this is cruel?

A Sure.

Q Do you think this is cruel?

A Sure.

Q Do you think this is cruel, what type of man could do something like that (indicating)?

A I don't know that my brother did that.

Q Do you know fingerprints were on that can?

A That was his can of lighter fluid?

MR. BOUDOUSQUE:

I have no further questions.

[964] MR. WEIDNER:

No questions.

[965-966] GLENN SMITH, 934 Montclair Road, Pensacola, Florida, was called as a witness by Counsel for the defendant and after first being duly sworn, was examined and testified as follows:

MR. WEIDNER:

Q Mr. Smith, do you know Robert Sawyer?

A Yes sir.

Q How do you know him?

A He is my uncle.

Q Would you relate to the jury please your experiences with Robert.

A He is just like my mother said, he has took care of me.

Q Was he ever cruel to you Mr. Smith?

A No sir.

Q Has he ever mistreated you?

A No sir.

Q Did he ever take you to do different things or engage in any activities with you.

A All the time.

Q What type of activities?

A He always took me to the park, to play baseball with me, football, took me to the movies.

Q Do you have anything else to say Mr. Smith?

A No.

Q Do you want your uncle to die Mr. Smith?

A No.

MR. WEIDNER:

I have no further questions.

MR. BOUDOUSQUE:

[967] I have none.

Mr. Weidner:

I call Robert Sawyer Your Honor.

[968] ROBERT WAYNE SAWYER was called as a witness by Counsel for the Defendant and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. WEIDNER:

Q Mr. Sawyer, you understand what you've been convicted of?

A Yes sir.

Q Mr. Sawyer, you were convicted of involuntary manslaughter in Arkansas, is that correct?

A Yes sir.

Q Tell us about what happened?

A Well I met this girl named Gwen. I met her from the Ship Ahoy, I think is the restaurant up there and we

dated there a couple of nights and I don't know, it seemed like we had a pretty good understanding with each other. Of course she had a little girl and her name was Laura at the time she was three. She hadn't quite turned four yet and I took them to the movies and out to eat and to the zoo and all of a sudden we moved in over in North Little Rock and rented a house over there. Well I was working laying bricks and Gwen, she was working at North Little Rock Furniture Company, I believe, over on West Capitol Street in North Little Rock and her mom, therefore, two days straight she took care of Laura. We would take her over there. I would drop the baby off at her mamma's house. It would have been her grandma's and I took Gwen to work and then I left where I dropped Gwen off to the job I was working on. And therefore two or [969] three days well her mamma took care of her but then her mamma, I wouldn't call her unstable but I mean she was a funny type person. One minute she was in a good mood and the next minute she was a person with ruffed up feathers. You couldn't get along with her. If you can understand that type of person, what I'm talking about, so that morning I asked her, I asked her are you going to watch Laura and she said no. She didn't have time and I asked Gwen are you going to stay home or are you going to go to work or are you going to stay home or what and she said no she was going to work and I said to heck with it so I took her to work with me so I carried her on the job with me and well she had what I am talking about a playsuit and of course I mean I kept moving her around because from where the sun, like if the sun was coming up on this side and I glanced over there and seen she was in too much of the sun well I would take her and

I kept her in the shade where she wouldn't be too hot and kept her from getting sunburnt.

Q Tell us what happened when Laura was injured, when you brought her to the hospital. Tell us what happened after that.

A Well on the morning the incident happened well I got up at five which it had been raining so I asked Gwen, asked me if I was going to go to work and I told her yeah I had to wait and see how it slacked up on the rain and she said she was going and for me to just take Laura and carry her to work with me because she [970] said she didn't want to take her over to her mamma's so I told her okay. So Gwen didn't drive her to work that day. She took a bus and I gave her a dollar or two dollars in change to catch a bus so that left myself and Laura there at the house. Well we lived upstairs where the kitchen table was over to the right in the kitchen and I had carpet and stuff in part of the house which in the apartment I hadn't had a chance to put in, I think it's linoleum or something down on the floor in the kitchen, therefore, it left bare concrete and anyway Laura, she was sitting there and I can still see her the same as I'm looking out there in the courtroom now and she was at the table. I gave her a bowl of cereal and two eggs and a glass of milk. Well she was sitting up there playing in the eggs which I was in a hurry to get to work to go on and try if I couldn't lay bricks I was going to do some inside work and she was sitting there, I mean well more or less she was playing in her food and I spoke to her and I told her Laura don't be playing and eat, so we can hurry up and go. Well she kept on playing and stuff and I reached over like to slap her on the shoulder and when I reached to slap her, in other

words, like that, she done this in the chair and the chair got unbalanced and over she turned. Of course when she did she hit her head on like I say, on the concrete floor. Well then she went as Mr. Boudousque stated in part of his report, I don't know if you've ever seen a muscle spasm but she went into [971] well her right hand went like this. Okay. And she was like, I don't know, I can't explain it. But I can explain it to the best of my ability and she was of course, it scared me.

Q I think we can understand how she was. What did you do at that point?

A I picked her up and put her in my car and I went downstairs and called and asked for an ambulance to come to that address and of course I stayed there and of course I went to the bathroom and brought a cold rag and laid it over her head, you know, at the back. Well the ambulance, he arrived I guess within three to five minutes. Well we left there and went to the North Little Rock Hospital which I couldn't ride in the ambulance because they said I wasn't, they put some legal way I wasn't her daddy or her mamma but I did follow them in my car behind them. We got to the hospital, well they wanted me to fill out certain papers and stuff and commenced asking me a bunch of questions. Well I answered the questions the best I could but I was trying to get the baby to get a doctor to examine her because I had my identification. I was proving who I was but I had no I.D. proving I was her daddy because I wasn't. It's true she was going under the name of Laura Durham and of course while at the hospital I did call the furniture company where her mamma was and I did go and I stayed at the hospital and I never did leave. I stayed there and she came to the

hospital there and Laura died at 5:00 o'clock that [972] afternoon. She died of a blood clot.

Q Pursuant to the incident you were convicted of involuntary manslaughter?

A Yes I was. Judge Kirby's Court.

Q This happened and you wever [sic] living at 64½ Magnolia North Little Rock, Arkansas.

A Yes, that's an upstairs apartment.

Q Mr. Sawyer, you understand you have been convicted of first degree murder?

A Yes sir.

Q Would you tell us what you know about the incident surrounding your conviction.

A I remember bits and pieces but as far as the whole thing no sir I can't.

Q Were you intoxicated?

A Yes sir I was.

Q Mr. Sawyer, tell us something about your life.

A About my life.

Q Yes.

A There is not really much to tell. I was born in Memphis. I was brought up on a farm and my mother died when I was three months old, took a four hundred and ten gauge shotgun and stuck it to her chest and she pulled the trigger and I just never have gotten over that. I always wanted to play ball and stuff when I was going to

school and have a life like any other normal kid, me and my daddy, we never did see eye to eye with each other. I tried to but some people you can reason with and some you can't and I did go out when I went [973] to play ball, it was from my house to Middleton, it was eight miles and I was hitching eight miles to go play ball and when I came back I got a whipping for going and playing ball but nevertheless I went and played anyway so this went on for a while and as I got older I decided to get away from that. I had a mare, that's a horse.

Q Do you have a son Mr. Sawyer?

A Yes sir I do.

Q Continue.

A But this was in May. I don't remember what year, but I sat on that horse and I proceeded from Middleton which is eight miles to a little town they call West Memphis, Arkansas. I proceeded to leave home and I left on that horse and the police or something, they never stopped me when I went through Memphis. I got to Arkansas bridge and I got off the horse, took the reins in my hand and led the horse across the Arkansas bridge. I got across the bridge there and got back on her and commenced at 6:00 o'clock across the weigh scales going to West Memphis and then I proceeded and left, turned left and proceeded to go to Brinkley. I got up there and it was getting dark so I asked this neighbor over there if there was somewhere I could go to water my horse and she told me they had a riding stable over there in West Memphis.

Q Excuse me Mr. Sawyer. How did you lose your eye?

A I lost my eye in a car wreck in 1971.

[974] Q Mr. Sawyer, do you understand the incident of which you have been convicted of participating in?

A No sir.

Q Why don't you understand them?

A Because I don't remember half of what went on.

Q Are you sorry that happened.

A Yes sir I'm sorry that happened.

Q Do you want to die Mr. Sawyer?

A No sir.

MR. WEIDNER:

I have no further questions.

CROSS EXAMINATION

MR. BOUDOUSQUE:

Q Mr. Sawyer, you say you don't want to die, correct?

A Yes sir.

Q At least you had that choice. Did you give that same choice to Frances Arwood? Does she still have that choice?

A Would you repeat your question please.

Q Don't you think Frances Arwood would have loved to have had that choice. Didn't you deprive her of the right to live?

A No sir I did not.

Q You didn't deprive her. How about Laura Durham. Did you deprive her of the right to live?

A No. That was stated in Judge Kirby's Court that was strictly an accident. It was tried to be avoided. It was an accident and stated in the Arkansas records.

Q Did you treat that child good?

[975] A Yes sir.

Q Did you ever hit that child?

A No sir I did not.

A No sir I did not.

Q Do you recall giving a statement to the police concerning that incident?

A Yes sir I know what you fixing to ask me and I will tell you the same thing I told them.

Q In your statement right here, this what I'm fixing to ask you?

A You are fixing to ask me. (Opposing Counsel examines document.)

Q What I'm fixing to ask you Mr. Sawyer –

MR. WEIDNER:

We object to the use of it and the Court sustained it.

MR. BOUDOUSQUE:

This is the defendant's own statement and he made certain representations and this is proper impeachment.

THE COURT:

This is his statement.

MR. BOUDOUSQUE:

I will lay the foundation.

MR. BOUDOUSQUE:

Q What was I going to say?

A On that statement you can read it and you can correct it and show me if I am right or wrong when I got to the hospital Laura did have some bruises on her because I was questioned about the bruises and which I told [976] them her mamma had spanked her but myself, I had not ever spanked her. I could do more with talking with her. I never spanked my own son.

Q You have never spanked that child before with a belt?

A No sir I have not.

Q What time did you take the child to the hospital. You said you were feeding her breakfast. What time was that?

A Would you repeat that.

Q You said you were feeding the child breakfast before she was taken to the hospital.

A Yes sir I was.

Q What time was that?

A I don't remember the time.

Q Was it in the morning?

A Yes sir.

Q Early in the morning before you went to work?

A Yes sir.

Q And that incident happened in the morning?

A I'm not sure exactly what time it happened.

Q When did you get up that morning.

A When did I get up. I got up at 5:30, the same as I always did.

Q After you got up at 5:30 about how many hours elapsed from the time you started hitting the child.

A Like I said when I got up it was raining and Gwen asked me if I was going to work. All right Gwen had to be at work at seven o'clock at North Little Rock Pharmacy Company. She had already left. She had already left and went to work so I would say prior between seven and [977] eight o'clock.

Q This incident happened in the early morning hours?

A I don't remember. I don't remember exactly what time of day it happened.

Q Do you recall giving a statement 11:28 p.m. 12-17-73?

A Yes sir.

Q In your statement it says yeah, that was her. Gwen, yes sir, did you whip Laura very much. Answer, quite a bit, yes sir. What did you whip her with. A belt. What kind of belt. Just a regular belt. What color was it. Brown with a love thing on it. Do you deny stating that?

A Do I deny stating that, no sir.

Q You do not deny that statement?

A You said did I deny it.

Q Do you deny it.

A You said did I deny it.

Q I'm asking you right now, do you deny this point in time ever making the statement of what I just read.

A I don't understand the question.

THE COURT:

Rephrase the question.

MR. BOUDOUSQUE:

Q Do you recall ever saying that?

A You asked me if I ever made that statement.

Q Yes.

A Yes sir I made that in the statement. That's my statement there.

Q So you did say that in that statement?

[978] A Yes sir.

Q Didn't you just tell this jury you never beat your child.

A I did not and I've never beat her.

Q Didn't you just say in your statement you beat her with a belt?

A I have spanked her but I have never beat her.

Q With a belt.

A I spanked here with a belt, yeah.

Q But you don't consider spanking a child with a belt necessarily beating her.

A No because I know what a beating is.

Q I'm going to show you a medical report where the child was brought to the emergency room, when she arrived at 1:44 p.m., that's quite a time difference between 5:30 in the morning and 1:44 p.m. is it not Mr. Sawyer?

A (The witness did not respond.)

Q Do you go to work at 1:44 p.m. in the afternoon?

A No sir.

Q In fact you go to work in the morning, do you not?

A I was working for myself.

Q But you work in the morning, correct?

A Yes sir.

Q How do you explain that child being brought to the emergency room at 1:44 in the afternoon if this incident allegedly occurred at the breakfast when she was eating her breakfast. Does she eat breakfast at 12:00 o'clock in the afternoon Mr. Sawyer?

A She was eating, I don't know if it was breakfast or just [979] what, but I know she was eating.

Q Now you don't know whether it was breakfast or what. I'm going to show you something else. It says the child was frail and appeared to be underweight particularly noticed was the fact the child had multiple scars on her body. We are talking about a child just under three years old are we not?

A Yes sir.

Q How did this child get multiple scars all over her body. Do you know?

A No sir I don't.

Q There were two healed scars on her forehead.

A I know where they came from, you are talking about the ones –

Q I'm talking about the ones in this report.

A She had a scar, the one you are reading.

Q There were two healed scars on her forehead and the scar the size of a nickle the right clavicle which appeared to be a burn scar.

A I can tell you she got that from a cigarette from her mamma.

Q She had a three inch scar across her instep.

A Over her foot she got that when she stepped on a broken bottle out playing in her grandparents back yard.

Q And both of her feet had big purple calcious appearing abrasions. How did she get that?

A She goes barefooted out there. She was going barefooted out there a lot where I was laying bricks and stuff.

Q She had multiple small bruises all over her body and how do you explain those bruises.

[980] A The bruises I don't know because like I told them at the hospital her mamma had spanked her earlier prior to that.

Q So for a three year old, three years into life Mr. Sawyer would you not say this child was fairly well beaten up and scarred?

A Well I got on to her mamma quite a bit for spanking her.

Q You got on to her mother.

A Her mother.

Q But you gave this child tender loving care.

A No sir. I corrected her trying to be a daddy to her, yes sir, but as far as beating her, no, because I know what it is like being beat.

Q So does Frances Arwood –

MR. BOUDOUSQUE:

I have no further questions.

MR. WEIDNER:

No questions.

THE COURT:

Do you have any other witnesses?

MR. WEIDNER:

No further witnesses Your Honor.

* * *

[985] MR. WEIDNER:

Ladies and gentlemen, I don't quite know what to say. I have never been in this position before. I guess I am doing exactly what Mr. Boudousque told you I was going to do. The decision whether Robert Sawyer [986] lives or dies is in your hands for one very simple reason. Should you decide today that he gets life imprisonment, well then the issue of whether or not he would be executed never comes up again. The issue remains a life only if you decide that he should be executed. I don't know what I can say for Robert Sawyer. He is a poor miserable little human being. He has had a hell of a life. He was involved in a very heinous act. He has been in a mental hospital. Like Doctor Arneson told you probably a sociopath. We know and it is never been attempted to be rebutted that Mr. Sawyer was intoxicated the day this incident with Frances Arwood occurred. You obviously believe that he is guilty of first degree murder. That is your verdict. How can we believe, I know I can't anyone in their right mind

or in possession of their faculties could do something like this. I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person. Charles Lane is serving life imprisonment. I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

* * *

CITY OF MEMPHIS HOSPITALS

SUMMARY SHEET

Unit No. 443216

Name Robert Wayne Sawyer

* * *

CODE DISCHARGE DIAGNOSIS according to STANDARD NOMENCLATURE

* * *

Chronic Brain Syndrome [ ] with unknown cause manifested by mild mental retardation and abnormal EEG with behavioral disturbances

[R. 00179]

Date: 1/19/67

WESTERN STATE PSYCHIATRIC HOSPITAL BY; S.M. SOLOMON, M.D. Patient's Name:

SAWYER, ROBERT WAYNE 31,424
[R.00210]

CLINICAL RECORD NARRATIVE SUMMARY

Date of admission: 8/16/66
Date of discharge 12/26/66
Sawyer, Robert Wayne, 31,424

The following is a final summary on Robert Wayne Sawyer, case number 31,424, 16 years old, white single male, education special classes, religion Methodist, admitted for the first time on 8/16/66 from Shelby County by RI commitment (competency removed). He has been an outpatient at Galler Clinic since February, 1965, diagnosis moderately retarded, chronic brain syndrome manifested by moderate retardation and abnormal E.E.G.

Reason for Admission: On Sunday prior to admission patient allegedly walked in on a lady in an outdoor toilet near a church and tried to choke her. Two years ago patient was accused of attempted rape. In February, 1966, patient continued to run away. His aunt felt that she could no longer control his behavior and she returned him back to Memphis.

On Admission: Patient admitted attacking a 39 years old woman sexually but was not successful. He denied visual and auditory hallucinations.

Physical Examination: Non contributory. Height 5'3", Weight 123 lbs., Temperature 99.6, Blood pressure 110/90. Laboratory findings and x-ray findings within normal limits.

Course in the Hospital: He was placed on Mellaril 100 mgs., t.i.d., Phenobarbital 1 grain p.r.n. h.s. Patient wets his bed

every night. He had full privileges. However, he began to annoy the girls on the hospital grounds and privileges were removed. He was placed on 9M in the Administration Building. He began to work in the employee dining room, however, he failed to make an adequate adjustment. He talked about going home all the time. He felt that he was not in a position nor in the mood to work. He showed childish behavior, lack of responsibility and he went AWOL on the day when his family came to visit him. He was discharged December 25, 1966, 30 days after his AWOL. During his hospital stay he received some R.C.T.s as well as tranquillizing [sic] drugs with little improvement in his mental attitude.

Mental Status on Day of Leave November 25, 1966:

Attitude and Behavior: He is fairly neat and clean in appearance, pays some attention to the interview and interviewer.

Stream of Mental Activity: Productions relevant, coherent, through [sic] becoming circumstantial in character.

Emotional Reaction: Emotional deterioration, inappropriate affect, behavior, grimacing and mannerisms noted.

Thought Content: No overt psychosis. No ideas of reference, influence, false perceptions could be elicited. However he does feel that nobody liked him in school, that nobody is interested in him, even though his family visits him very often and apparently are overprotective of him.

Sensorium is clear. Orientation – oriented in all spheres. Memory is adequate both for recent and remote events. Attention and concentration fair. General information and calculation adequate and commensurate with his education. Apperception poor. Patient does not realize

the degree of his psychogenic dissolution. Insight, judgment and reasoning defective.

Mental Diagnosis: 22.7 Schizophrenic reaction, childhood type

Physical Diagnosis: None apparent

Patient is incompetent. Competency removed. Patient is a minor.

Stress: Severe

Predisposition: Severe

Apparently this patient failed to identify himself with parents or siblings and lack of ego strength and ego ideal is the dynamic cause of the patient's illness.

Physical Diagnosis: None apparent

Prognosis: Guarded

Even though the patient may adjust temporarily at home under the supervision of his parents who overprotect him he is incapable of competing in the outside world for employment. He will therefore need welfare assistance to stay at home.

Date: 1/19/67

WESTERN STATE PSYCHIATRIC HOSPITAL BY; S.M. SOLOMON, M.D.

Patient's Name

SAWYER, ROBERT WAYNE 31,424
[R. 00211]

[LOGO]
Hospital for Joint Diseases
Orthopaedic Institute

A teaching hospital of New York University School of Medicine

ORRIN DEVINSKY, M.D.
Chief, Department of Neurology-HJD
Director, NYU-HJD Comprehensive Epilepsy Center
Associate Professor Neurology, NYU School of Medicine

October 1, 1990

Nicholas J. Trenticosta
Loyola Death Penalty Resource Center
210 Baronne St, Suite 608
New Orleans, LA 70112

Re: Robert Sawyer

Dear Mr. Trenticosta:

I have reviewed the records you provided me (school records, mental health treatment in City of Memphis Hospital and Western Mental Health Institute, and various medical records), obtained a history and performed a neurological examination on Robert Sawyer on September 30, 1990. This report summarizes my findings.

History: Early evidence of mental retardation appears in the results of Mr. Sawyer's first IQ test (Stanford-Binet, IQ 73) at age 9 years. He had a severe pervasive learning disability. In addition, he exhibited aggressive behavior as a young child and at the time he was referred for special education his teacher described his behavior as "essentially aggressive in that he is always attempting to start something with punching,

pinching, pushing, etc. he picks on boys twice his size and usually ends up getting hurt".

His history is also remarkable for several episodes of significant head trauma with loss of consciousness for periods of between 45-120 mins. At age 5 years he fell off a bicycle and was unconscious for approximately 2 hours. at age 15 years he states he was kicked in the head by a horse and was unconscious for an unknown duration (one medical report states 2 hours) but first recalled events in the hospital approximately 60 hours later (corresponding to the period of post-traumatic amnesia). At age 21 years he was in a motor vehicle accident and sustained head trauma with loss of consciousness for approximately 2 hours. He lost his left eye in this accident. At age 25 years he was struck in the head by a car jack and suffered a loss of consciousness lasting 45 minutes and a 2 inch laceration on his upper forehead near the midline, with a residual scar.

In addition, a family member reports that Mr. Sawyer's mother attempted to suffocate him prior to her taking her own life when he was 3 months old, due to presumed postpartum psychosis. Suffocation with lack of oxygen to the brain may be the cause of Mr. Sawyer's mental retardation and neurological behavioral disorder.

Other records reveal that at age 16 years Mr. Sawyer underwent a course of electroconvulsive therapy, the details of which are not available in the medical records that were sent to me. Mr. Sawyer states that he received 3 shock treatments per day for a period of one month. He reported that a towel was placed in his mouth to protect his tongue and teeth. This suggests that neither muscle

relaxants nor oxygen were administered and this therapy may have caused brain injury.

General medical examination is remarkable for a 2-inch scar over the upper forehead, near the midline. The left eye is artificial.

Mental status examinations. He is alert and fully oriented. He had difficulty relating an orderly and clear description of the neurological history. He was inattentive. He was able to repeat 5 numbers forward and 3 numbers backwards. Speech was fluent with spontaneous work finding pauses. Repetition was mildly impaired. Comprehension was normal. Writing is normal. Confrontation naming was mildly impaired. Short term memory 0/3 at 5 mins on spontaneous recall and with cueing. Fund of knowledge and geographic orientation were mildly impaired. Praxis and right-left orientation are normal. he is unable to perform simple calculation (eg, 20-2 = 18). He made frequent errors on the hand sequence test with perseverations and inability to correctly perform the correct 3 step sequence with either hand. He was unable to copy and then spontaneously draw a simple sequence of figures. Visuospatial constructions are poor. *Cranial nerves*: I-XII were normal except: decreased smell left nostril, left eye enucleation with prosthesis, diminished light touch over left eye (VI). *Motor*: normal bulk and tone, strength is normal. Mild, 10th tremor of right upper extremity with volitional movements. *Sensory*: normal (except for left VI distribution as above) for light touch, vibratory, pin and proprioceptive sensation. *DTRs* 1 = throughout except left ankle absent. Toes downgoing bilaterally. *Cerebellar and gait*: normal except slight decreased left arm swing in spontaneous gait.

Impression: At an early age, Mr. Sawyer exhibited signs of significant neurologic brain injury. His diminished cognitive skills and behavioral disorder were evident at age 9 years and may have been idiopathic/genetic or possibly due to the alleged episode of attempted suffocation by his mother when he was an infant. Mr. Sawyer's early inappropriate aggressive behavior, described by his teacher, is not uncommon in children with neurologic damages. His repeated attacks on children twice his size, in which he "usually end(ed) up getting hurt, were not the product of a reflective behavioral style, but are characteristic of impaired impulse control and impaired ability to recognize the consequences of actions. By age 25, Mr. Sawyer had sustained significant head trauma on at least 4 occasions with loss of consciousness for periods between 45-120 minutes and post traumatic amnesia lasting up to 60 hours. Repeated trauma to the head results in increasing neurologic damage. In Mr. Sawyer's case, the severity of the cumulative damage was likely to be more pronounced due to his preexisting neurologic disease. The length of Mr. Sawyer's post-traumatic amnesia following the incident in which a horse kicked him in the head indicates that he suffered severe diffuse brain injury. Durations of over 24 hours are associated with significant neurologic damage.

The results of Mr. Sawyer's neurological examination confirm global cognitive impairment and specifically point to evidence of prefrontal dysfunction. This is an area that is often traumatized in head injury. The prefrontal areas play an important role in controlling basic drive functions such as sexual and aggressive thoughts and actions. Prefrontal brain injury results in an inability to

inhibit and control aggressive thoughts and actions. It affects the decision-making process: impulsive action precedes measured consideration. Intoxication exacerbates the impairment.

At the time the crime was committed, Mr. Sawyer's brain damage, specifically in the prefrontal areas, impaired his ability to control aggression and to comprehend the consequences of his actions. A long night of heavy drinking immediately preceding the murder intensified the neurologic impairment. Mr. Sawyer reacted violently and inappropriately when confronted with what he believed to be evidence that two young children had been drugged. Uninhibited, his aggressive impulses dominated his behavior for a period of time during which he could not comprehend that the increasingly destructive physical abuse of the victim would lead to her death. Brain damage, aggravated by intoxication, impaired his capacity both to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

Sincerely,

/s/ Orrin Devinsky
Orrin Devinsky, M.D.

[LOGO]
Hospital for Joint Diseases
Orthopaedic Institute

A teaching hospital of New York University School of Medicine

ORRIN DEVINSKY, M.D.
Chief, Department of Neurology-HJD
Director, NYU-HJD Comprehensive
Epilepsy Center
Associate Professor Neurology,
NYU School of Medicine

November 27, 1990

Nicholas J. Trenticosta
Loyola Death Penalty Resource Center
210 Baronne St, Suite 608
New Orleans, LA 70112

Dear Mr. Trenticosta,

I have reviewed the EEG and MRI scan on Mr. Robert W. Sawyer. The MRI shows a small punctate focus of increased proton density in the subcortical white matter of the medial left frontal lobe which supports the history of head trauma. Furthermore, there is a signal void on both the T1 and T2 weighted images in the superior sagittal sinus, consistent with thrombosis. This was identified by Dr. Normal Leeds, the Chairman of Radiology at Beth Israel Hospital in New York City and a world-renowned neuroradiologist. This is an unusual finding and is also consistent with a history of head trauma.

As I stated in my original report the type of neurological deficits Mr. Sawyer has are characteristic of frontal lobe injury. The MRI provides supporting evidence that he has brain damage. These abnormalities are a marker for other

brain abnormalities that are at a microscopic or functional level, and severely compromise his intellectual, emotional and behavioral functions. In short, Mr. Sawyer's brain damage in the frontal lobe severely limits his ability to conform his conduct to acceptable behavior, severely limits his ability to control aggressions and impulses, and contributes to his subnormal intelligence.

The EEG is within broad limits of normal.

In summary, the MRI supports the diagnosis of trauma-induced frontal lobe inury [sic]. However, it must be emphasized that Mr. Sawyer's multiple episodes of head trauma, and possible suffocation as an infant, may cause profound cognitive and behavioral disorder without any abnormalities identified in the MRI or EEG obtained years after the neurological damage occurred. This point is well known in the medical community by physicians who care for patients who have been suffocated or suffered significant head trauma.

If there are any questions concerning this case or issues that require further clarification, please do not hesitate to contact me.

Sincerely,

/s/ Orrin Devinsky
Orrin Devinsky, MD

ALEC J. WHYTE, M.D.
BOARD CERTIFIED PSYCHIATRIST
2905 MARFIELD ST., N.W.
WASHINGTON, D.C. 20008

TELEPHONE 202-462-3333

October 1, 1990

Mr. Nicholas J. Trenticosta
Loyola Death Penalty Resource Center
210 Baronne Street, Suite 608
New Orleans, Louisiana 70112

Re: Robert Sawyer

Dear Mr. Trenticosta:

At your request I conducted a psychiatric evaluation of Robert Sawyer to determine his past and current mental functioning and, in particular, to determine whether any psychiatric condition exists that would speak to the issue of mitigation in his legal predicament. The interview, lasting 2 hours and 45 minutes, took place at the state penitentiary at Angola on September 27, 1990. I also have read the various documents which you have forwarded to me, namely, school records, medical records, psychiatric records and summaries of social history. This report contains my professional opinion reached after having examined Mr. Sawyer, conferred with your staff and carefully reviewed the documents noted above.

Robert Sawyer suffers from, and manifests the symptoms of, the following psychiatric disorders:

310.10 Organic Personality Syndrome (formerly Organic Brain Syndrome)

317.0 Mild Mental Retardation

The format of this report will be (1) to provide a basis for the psychiatric diagnoses and to highest relevant specific deficiency symptoms associated with those diagnoses, and (2) to indicate what impact these symptoms would have on the required legal procedures.

Mild Mental Retardation: According to all of the classification manuals, mental retardation is defined by the coexistence of two features: significantly subaverage intelligence and deficits in adaptive behavior. The degree of retardation is determined by reference to both of these features. Robert Sawyer's IQ measurements have fallen in the 60's to low 70's [the upper side of mild retardation (50-70)]; however, his IQ scores, when taken together with the degree of deficit in his adaptive behavior which has been worsened by his Organic Personality Syndrome, places him together with the degree of deficit in his adaptive behavior which has been worsened by his Organic Personality Syndrome, places him clearly at the lower end of mild retardation – functioning at the third, perhaps fourth, grade level.

Certain biomedical causations and findings are associated with the retardation syndrome: heredity, particularly a low maternal IQ, persistent alcohol use during pregnancy causing fetal alcohol syndrome and perinatal malnutrition. Robert Sawyer's neonatal history suggests the presence of such conditions. The later-manifested impairments of neurointegrative functions could be related to his basic retardation but are certainly a sign of the more important diagnosis, Organic Personality Syndrome, and will be discussed in detail below.

Organic Personality Syndrome: This disorder is described in the diagnostic manual of the American Psychiatric Association (D.S.M. IIIR) as follows:

> "The clinical syndrome in a particular person depends principally on the nature and localization (in the brain) of the pathological process. A common pattern is characterized by *affective instability and impairment in impulse control or social judgment*. The individual may be *belligerent* or have *temper outbursts that are grossly out of proportion to any precipitating psychosocial stressor. Socially inappropriate actions, such as sexual indiscretions, may be engaged in with little concern for the consequences*. Another pattern is characterized by marked apathy and indifference. Both of these patterns may be associated with *damage to the frontal lobes*, and for this reason are sometimes referred to as 'frontal lobe syndrome' . . . The major personality change may be the development of *suspiciousness or paranoid ideation. . . . Mild cognitive impairment and irritibility* [sic] may be present. . . . The degree of impairment is variable. Despite relatively intact cognitive function, *poor judgment* may lead to such difficulties that the person may require constant supervision or even custodial care. . . . Socially unacceptable behavior may lead to *social ostracism or legal difficulties. Impulsive or explosive behavior may be dangerous to the individual and to others*. . . . Organic Personality Syndrome is usually due to structural damage to the brain. the most common causes are neoplasms (for example, meningiomas pressing on the frontal lobes, *head trauma (including the post-concussion syndrome)*, and vascular disease." [Italics are mine.]

The above description reads like a veritable summary of the life history of Robert Sawyer as it is expressed in the various social histories, school and medical records, and indeed in his own words to me.

The earliest laboratory indication of brain damage was an abnormal electroencephalogram (EEG) in 1965 when Robert was 14 years old (your file: Ii,A,1); however, the most probable etiology was a concussion sustained at age 5 years (1955) in an alleged fall from a bicycle following which Robert remained unconscious for a period variously described as 45 minutes to several hours (II,B,4) Subsequent head trauma was sustained in an alleged fight causing another several-hour period of unconsciousness (II,B,4). Although Robert's father and grandmother related these events to various medical personnel over several years, I have expressed the reservation ("alleged") because there exists here a pattern of early life trauma suggestive of severe physical abuse. For example, (1) no medical attention was sought for the above-mentioned comatose states; (2) somewhat suspicious explanations of prolonged unconsciousness are offered (falling from a *bicycle* at *age 5*; a fight with another boy in later childhood); a history of other early-life trauma (broken arm at age 4); and, finally, the history given by Robert and other family members of frequent, often severe, beatings by his father.

Although brain damage could be the result of a prenatal event or neonatal anoxia, the history most strongly suggests a post-concussion etiology following single or repeated head trauma in late childhood. The functional manifestations of Robert Sawyer's brain damage, or Organic Personality Syndrome, are (1) behavioral, related

principally to poor impulse control, and (2) cognitive related principally to a specific defect in information processing.

Behavioral Symptoms. It is unclear whether Robert Sawyer's nightly enuresis, which has continued to the present day, is a result of his Organic Personality Syndrome, since its exact date of onset is unclear and it could be related to local genitourinary structural abnormality. It is known that enuresis of this severity is often associated with an abnormal EEG.

Robert's behavioral symptoms fall mainly in this characteristic area of poor control with regard to hyper-aggressive and hyper-sexual impulses:

– "Bobby's behavior is essentially aggressive in that he is always attempting to start something with punching, pushing, pinching, etc." Teacher's note 8/18/59. Age 8. (I,A,1)

– "Brought in on lunacy warrant . . . at request of Juvenile Court. Father says his son is 'over-sexed' since 8 years of age. Barred from Millington School because of rape accusal . . . has a habit of destroying female undergarments . . . Made obscene phone calls; was charged . . . He (patient) complained, 'I'm over-sexed' and that he, 'gets angry easily, very easily' . . . History indicates impulsive ego disoriented [sic] with poorly directed aggressive drives and sexual orientation. Masturbates 4-6x daily because of rage volunteered by patient." Physician's Admission note. City of Memphis Hospital. 6/17/66. Age 15. (II,A,1,2)

– "He seeks hospitalization because he is 'over-sexed.' Admits to attacking a neighbor of 39 years old sexually but was not successful." Physician's Admission Note. Western State Hospital. 8/16/66. Age 15. (II,B,1)

– "Patient's father dated the onset of illness to two years ago (age 13). At that time the patient was accused of attempted rape .. . . . Father states patient frequently got into fights with his peers. . . . The patient's father related that, for about two years, the patient had 'taken women's panties and relieved himself.'" Social Work History. Western State Hospital. 8/64 (II,B,4)

– Robert Sawyer informed me during the September 27th interview that he left home permanently at age 17 after a particularly violent fight with his father in which a shotgun over which they were struggling "went off," injuring neither man. This followed Robert's coming to the defense of his stepmother whom his father was beating. At age 18 he married, and described to me a chaotic life until convicted of manslaughter in the death of a four-year-old girl in 1972. After two years in prison, Robert immediately resumed his unstable and impulsive life, including a second marriage without divorce from the first, until convicted of the offense for which he is currently under sentence.

– As might be expected during periods of incarceration, 1972-74 and 1978-present, Robert Sawyer's behavior was less out of control because of the external structure and supervision provided in that environment.

Cognitive symptoms. Two main areas of cognitive dysfunction have been noted in Robert Sawyer, and both are characteristic of an Organic Personality Syndrome:

1) A pervasive perception and attitude of suspiciousness and paranoid ideation. In every document reviewed (school records, medical and psychiatric records, social histories), some particular notation of this aspect of Robert's thinking was entered. It was obvious during my interview with him with regard to both his past and current life situation.

2) A prominent, specific defect in information processing, namely, and inability, or severely impaired ability, to perform abstract thinking, to make generalizations or to understand abstract concepts. This results in a symptomatic speech pattern consisting of concreteness, preoccupation with relating details, perseveration, repetitiveness and a particular type of confabulation; that is, filling in with unfactual or approximative, concrete details and guesses when confronted with situations requiring even relatively simple abstract reasoning. In brief, the multiplication of concrete details is used as a substitution for, or cover up of, the lack of the ability to abstract and generalize. Sawyer exhibits some rudimentary insight into this defect when he says "All I can tell you is what I see," and "I can't put my words where they want to go."

Robert Sawyer's brain can process or transform the sensory input of his experience into concrete signs or signals which simply indicate the need for some immediate behavioral response. He is grossly defective in being able to transform the data of his sensory input into symbols that represent the experience in an abstract and therefore generalizable form.

During the painstakingly detailed monologues in response to my questions, Robert invariably paused for 20-120 seconds when reaching for an abstract word. For example, when describing his first experience with sexual intercourse, he called it (after a significant pause) his "initiation." When asked what initiation meant, Robert answered (after a long pause) "Like I said, it's the first time someone has sex." When asked what else initiation could refer to, Robert repeated, "It's just your first sex." Likewise, in relating a job experience, he paused at length before finding the word to describe his employer. "It was Manpower I worked for," he continued. I asked how he remembered the word manpower; he answered, "I pictured the street corner that the building was on where we checked in." I asked what manpower meant; he answered, "It's a place where men are sent out to jobs." When asked what else might manpower mean, he responded after hesitation, "A man with big muscles." Clearly the capacity to associate abstract words with a generalized concept rather than with a single concrete experience is lacking in Robert's brain functioning.

Forensic Relevance:

(1) Behavioral Symptoms. the impulsive aspect of Robert Sawyer's behavior in response to emotional interpersonal situations or to his own aggressive and/or sexual mood occurs with minimal if any, intellectual reflection. Any experiences such as moral culpability, consideration for others involved or any understanding of the generalized significance of his behavior is lacking, regardless of outward appearances. His behavior in response to emotional signals is akin to a reflex arc having perhaps ritualistic but not truly rational significance.

(2) Cognitive Symptoms. Robert Sawyer's deficit in using or comprehending abstract words and symbols severely limits his capacity to understand general legal concepts and their particular applicability. Therefore, dialogue with counsel regarding defense strategies, plea bargaining, ect., could not be understood beyond some limited, concrete sign value which he would ascribe. For example, he insisted during my interview that "evidence" was "something lawyers used against you." When asked if evidence could be used in one's behalf, he answered, "No, only against you." When asked to define evidence, he said, "It's what lawyers put on a yellow pad like the one you're using." No more adequate definition could be elicited.

Summary: It is my opinion that Robert Sawyer suffers from an Organic Personality Syndrome secondary to frontal lobe brain damage, which resulted from head trauma and concussion. This diagnosis is consistent with the diagnosis of Chronic Brain Syndrome (older terminology) made in 1966 by the staff of the City of Memphis Hospital. This condition, complicated by mild mental retardation, has seriously compromised, and continues to compromise, this individual's capacity for reflective behavior and for the comprehension of concepts involving any degree of abstraction or generalization, such as are essential to legal procedure. This diagnosis should therefore serve purposes of mitigation in the consideration of the judicial consequences of Robert Sawyer's behavior.

Should there be the need for any clarification of this report for consideration of matters which I may have overlooked, please write or call me.

Sincerely yours,

/s/ Alec J. Whyte, M.D.
Alec J. Whyte, M.D.

[LOGO]
fisher and associates

113 Mallette St. • Chapel Hill, NC 27514 • Phone 919 968-4931

PSYCHOLOGICAL EVALUATION

Name: Robert Sawyer
Evaluator: Dr. Brad Fisher
Dates of Evaluation: 9/20/90
Place of Evaluation: Death Row, Angola Prison – Louisiana
Date of Birth: 10/8/50
Age: 30
Education: Seventh Grade (1963-64) – Special Education

REFERRAL AND IDENTIFYING INFORMATION

This 39 year old white male is currently on Death Row status at Angola Prison in Louisiana where he has been since January of 1983. He was referred for evaluation by his attorney, Nicholas Trenticosta of the Loyola Death Penalty Resource Center. Their address is 210 Baronne Street, Suite 608, New Orleans, Louisiana 70112. The purpose of the evaluation was for the assessment of overall psychological dynamics, including an intellectual assessment, neurological screening, and the evaluation of his personality profile.

BACKGROUND OF EVALUATOR

Dr. Fisher is a graduate of Harvard University (cum laude 1972) and one of only two programs in the country offering a specialization in forensic or correctional clinical

psychology (University of Alabama, 1976). His dissertation there was in the prediction of dangerous behavior, and his subsequent work over the last 15 years has always been in the area of forensic clinical assessments, most frequently of those who have committed violent crimes. He currently resides in North Carolina, where he has been a teacher both on the staff at the University of North Carolina and at Duke University. Details of this background are available in the attached vita.

TESTS ADMINISTERED AND MATERIALS REVIEWED FOR CURRENT EVALUATION

The following materials were reviewed and play a role in the opinions expressed in this report.

I. School Records Summary
   - A. Referral for Special Education Evaluation
   - B. Psychological Report
   - C. Accumulative Record Sheet
   - D. Medical Form

II. Mental Health Treatment Summary
   - A. City of Memphis Hospital
     1. Admit Notes
     2. Physician's Notes
     3. Nurses Notes
     4. Clinical Chart
     5. Discharge Notes
     6. Discharge Diagnosis

B. Western Mental Health Institute Summary

1. Admit Notes
2. Doctor's Orders
3. Nursing Notes
4. Social Case History
5. Medical History/Mental Status
6. Staff Conference
7. Court Commitment Papers
8. Progress Notes
9. Escape Report 1 & 2
10. Final Narrative Summary

III. Medical Records Summary

A. Methodist Hospital Emergency Room

1. Chief Complaint – Scleral Laceration
2. Operation Report
3. Physician's Orders

B. Methodist Hospital

1. Chief Complaint – Pthisis Bulbi – painful
2. Operation Report
3. Physician's Orders

C. University of Arkansas Medical Center Emergency Room

1. Chief Complaint – Syncopal Episode

D. University of Arkansas Medical Center Eye Clinic

1. Replacement of Prothesis

E. City of Memphis Hospital Emergency Room

1. Chief Complaint – Injury wrist-hand

F. City of Memphis Hospital Emergency room

1. Chief Complaint – Fell into river

In addition to these materials reviewed, several tests were administered over the approximately four hours spent on the Death Row unit, and play a role in the opinions expressed in this report. These include the following:

1. Intellectual Assessment
   a. The Wechsler Adult Intelligence Scale (partial)
2. Neurological Screening
   a. See also Wechsler test above
   b. The Bender Visual Motor Gestalt
   c. Halstead Rietan Battery (partial)
   d. Neurological Screening Examination
3. Projective Testing
   a. The Incomplete Sentences Blank
   b. The House-Tree-Person Test
4. Other
   a. The Personal History Checklist
   b. The Mental Status Examination

DEVELOPMENTAL AND BACKGROUND DATA

Robert Sawyer appears to have been raised in a chaotic and abusive home environment, nearly always functioning in circumstances below the poverty level. Specifically, it seems worthy of note that his father was physically abusive over several years and that his mother suffered post-delivery psychosis and committed suicide. Reports further note the suspected cultural-familial dysfunction, although this is relatively obvious from the points already stated.

By the time Robert was nine, he had been referred to the Special Education Department for testing because of difficulties in learning. In addition, these problems included bedwetting. This culminated in scoring at a level zero in reading, math and spelling, even when he had been in school three years (being in the second grade at that time).

Recognition of developmental and psychological problems continued, and resulted in psychological testing when he was eight years old. At this point, he scored a mental age a couple of years younger than his chronological age, and an IQ of 73. At his point, he was recommended for the EMR (Educationally Mentally Retarded) class.

An overview of his school records demonstrate at least a couple of points. First, his abilities were seriously regressed or retarded with consistent grades of D or F from the time he was six years old. It appears that some of the teachers believe that this is due to his home environment, whereas others are unclear as to the etiology of these learning and developmental problem issues.

In addition to the death of his mother, it appears that a primary reason for his discontinuation of school at such an early age (i.e., 1963-64) had to do with the increasing problems which eventually led to hospitalization for mental health treatment at the age of 14. To summarize a long series of institutionalization and treatments starting at this point, it should be noted that the mental problems already discovered through EMR placement earlier in his life appeared to have been exacerbated by the age of 14 into behavioral disturbance, and appeared to continue at a high level (i.e., resulting in mental health placements) for the rest of his development.

To be more specific, his placement at the City of Memphis Hospital in June of 1966 included the prescription of Thorazine (50 mg PO). It is noteworthy that this is a medication most frequently administered and recommended primarily for the treatment of psychotic conditions on the part of the patients. Further, it is noteworthy that the discharge diagnosis, even at this early point in his life, was a "Chronic Brain Syndrome manifested by mild mental retardation and abnormal EEG with behavior disturbance."

Later, in 1966, he was hospitalized at the Western Mental Health Institute (from 8/16/66 until 11/25/66). During this hospitalization, doctor's orders included Mellaril at 100 mg TID as indicated for a possibly psychotic condition. In addition, he was given Phenobarbital, which is usually prescribed for epileptic conditions and other neurological problems. Furthermore, it should be noted that even at this early time in his life he began to be administered ECT, commonly known as shock therapy. His own reports to me of this experience is that he hated those

experiences, since they frequently resulted in his inability to remember even things that he knew as common day-to-day occurrences the day before (specifically, he forgot the name of a cup and of a bottle of ketchup). The reports from these early case histories also indicate possible psychiatric treatment recommended in connection with psychosexual problems. By the end of 1966, it appears that his medical history included more that one institutionalization, with the discharge summary from the second admission resulting in a diagnostic impression (9/22/66) of a schizophrenic reaction, childhood type, with the notation that this impairment was moderate. In this same visit he was certified as incompetent (document dated 1/7/67). Among the notes given during this time of his development were ones that noted that his insight, judgment, and reasoning were defective, and that he had a childhood type of schizophrenic reaction.

Later in his development, he continued to develop a history of institutionalizations that included several emergency room placements, and a possible other mental health placement in either Benton or Denton, Texas at the Temple Facility (records not available at this point). These hospitalizations included one at the Arkansas Medical Center in Little Rock in 1973 in which the patient had dizzy spells and felt "rubbery." He also had a blackout because at that time he was suffering from syncopal episodes. In addition, there is a case history data indicating two severe head injuries which rendered him unconscious.

In addition to the overall chaos of his environment, centering on lack of any normal parenting, probable abuse by the father, suicide from the mother, and multiple

placements before being on his own at the age of 14, it should also be noted that Mr. Sawyer has been through two dysfunctional marriages. The first marriage lasted approximately a year and resulted in a boy (Scott Wayne Sawyer). It should be noted that he was married in this case to a Rosemary Marie Reeves when he was only 18 years old (in 1969) and that the boy was born in May of 1970, but that they had separated by 1971.

His work history literally begins with sporadic odd jobs starting after running away from home between institutional placements at the age of 17, at the age of 14, and it continues unabated until the time of his current arrest. Most of these jobs had been on riverboats or as a deck hand connected with this area of work. He has also worked with horses and at stables off and on.

His only previous incarceration was for one year and ten months at the Cummin's Prison in Little Rock, Arkansas for an involuntary manslaughter conviction based on a four year old child who had died from falling off a high chair, and who was in his care.

Finally, it should be noted that he describes his development as culminating in a move towards excessive drinking starting in 1978 because of his combined problems. It should be noted that he was 28 years old when he was arrested on the current offense in 9/27/79. This heavy drinking (not including drug use, however) culminated in a binge around the time of the crime which appears excessive even by extended standards. His self report has him drinking starting at 8:00 the night before the crime, all night, until nearly 7 the next morning, when he has consumed an innumerable number of drinks including

Mad Dog 20/20, Jack Daniels and Coke, and Old Grandad Whiskey, combined with other types of boilermakers. Furthermore, he recalls having almost nothing of substance to eat during this time. The murder occurred at approximately noon on the next day. It is his recollection that he was seen by several others that morning upon coming home, who noted his level of drunkenness, to the point where he had to crawl on his hands and knees from the car. In his own recollection, he says that he had nearly no idea where he was for four days in the jail after his arrest. Delirium tremens symptoms were also noted.

OVERVIEW OF TESTING RESULTS

There are considerable indicators of both neurological dysfunction (brain damage) and of a mild level of mental retardation (current full-scale IQ measured 68 with previous scores falling lower, including findings in the moderate retardation range – which requires a full scale score below 55). These results are consistent with his history of multiple head injury, abnormal EEG and syncopal episodes.

In the latter category, it should be noted that the current results are somewhat higher than the initial testing done in 1966 which report him at the moderate level of mental retardation (see State of Tennessee Department of Mental Health Medical History and Mental Status Record first – page one, paragraph one). However, the difficulty in a final opinion considered by this evaluator, is the complexity in separating out the previously noted condition through IQ score and EMR placement, as separate from

the neurological impairment (also noted in the records from the age of 16).

Although the other condition was previously noted as a "chronic brain dysfunction" the current evaluation has findings suggesting that this brain dysfunction may be somewhat diffused, but more relegated to right hemisphere damage. This is noted through extremely poor performance on any areas requiring spatial evaluation and/or replication. His Bender Visual Motor Gestalt test includes multiple mistakes, primarily in the area of figure angulation, and figure size (although there are difficulties in other areas such as figure rotation as well). These kind of problems are mimicked on the Rietan-Indiana Aphasia Screening Test as well through repetition of such figures as the cross, the triangle, and the key. The fact that the chronic brain dysfunction has been noted during his childhood, however, is suggestive that the impression that this is due to neurological dysfunction rather than to sight dysfunction alone, is probably the most realistic.

A final note on the testing should point out that there was every indication that his client was attempting to perform at his best ability and was making no attempt to manipulate the examiner in any direction. Consequently, with the possible exception of the unknown influence of loss of his left eye, I believe the current results can be considered to be valid.

SUMMARY AND OPINIONS

It is the opinion of this evaluator that, while this client does not suffer from a psychotic condition, or a condition of any kind of major affective disorder, he may well

suffer from a level of neurological dysfunction, that in turn may be connected with his consistent scoring in the mentally retarded range of intelligence. I believe that this latter scoring is more readily attributable to neurological dysfunction than to his lack of schooling. Furthermore, I believe that these findings of neurological dysfunction may well be related to connected behavioral dysfunction, including the possibility of poor judgment under stress and impulsive acting out behaviors, especially at those times. Indicators of brain damage in clients reporting uncontrollable violent-rage behavior are often indicative of possible frontal lobe dysfunction. When these handicaps are combined with the self administration of massive amounts of alcohol, it is probable that whatever neurological deficits are present will be exacerbated. Consequently, it is likely that these problems were exacerbated at the time of the crime because of the data suggesting large levels of alcohol ingestion without nutrition, and consequently may have resulted in a psychotic breakdown at that point (i.e., not a chronic condition, but one caused by the combination of neurological handicap and alcohol ingestion without nutrition). Psychosis can best be explained in this context as a condition where a person is not in touch with reality and may have severe limits in cognitive and judgmental functions such as the ability to differentiate between right and wrong. It is important to note that any diagnosis of psychopathic trends should not have been made for this, or any client, without previously ruling out the possibility of brain damage.

Report Submitted,

/s/ R. Brad Fisher, Ph.D.
R. Brad Fisher, Ph.D.

State of Tennessee

County of Shelby

AFFIDAVIT OF RUBY WILKERSON

1. My name is Ruby Wilkerson. I am a resident of Shelby County and am over eighteen years of age. I am Robert Wayne Sawyer's aunt. His mother was my sister.

2. My sister was a very sad, broken-hearted woman. She was treated horribly by her husband Robert. He never had a kind word or gesture for her. I believe his abuse of her drove her to kill herself.

3. After my sister died, Robert Sawyer turned all of his hate and anger on his son, Robert Wayne. It was like he was unable to love anybody, even his own child. Robert Wayne was beaten, taunted, humiliated, and rejected by his father. He was told that he was stupid and that he couldn't do anything right and he quickly grew to believe it as truth. He became a quiet, withdrawn child, with no friends or self-confidence.

4. Robert Sawyer destroyed his wife's life and if that wasn't enough, he destroyed his son's too. I believe if Robert Wayne had gotten the care and love and attention he needed when he was a child, he wouldn't be where he is today. If any of Robert Wayne's attorneys would have contacted me, I could have told them about Robert Wayne and testified in court.

Further affiant sayeth naught.

/s/ Ruby Wilkerson
Ruby Wilkerson

Sworn to and subscribed before me this ___ day of Oct., 1990

/s/ Illegible
NOTARY PUBLIC

My commission expires: 1-23-94

State of Tennesse [sic]

County of Shelby

AFFIDAVIT OF JEANNIE WARF

1. My name is Jeannie Warf. I am a resident of Shelby County and am over eighteen years of age. I am Robert Wayne Sawyer's aunt. His mother was my older sister.

2. I grew up right across the road from the Sawyer family. I was friends with their two daughters, Mildred and Virginia. I wasn't friends with their son Robert though. He was so cruel and hateful that I was a little afraid of him and tried not to be around him too much, especially alone. He would do things just for spite and to be hurtful. I remember once, I had a new coat (which was something that you didn't get very often in those days) and I was so proud of it and happy. I went to the Sawyer's to show the girls and while I was there, Robert lit a firecracker on my back and burned a big hole in my coat. I remember he just laughed and laughed about it too. It was like he was only happy when other people were miserable.

3. I don't believe my sister Betty had one happy day after she married Robert. They lived with Robert's family in a two room house that was falling down around them and even had to go across the way to use the next-door church's outhouse. Robert never wanted her to visit with us and I remember Betty crying because he would never let her take their daughter Glenda Sue across the road to see my mother and daddy. He would say such terrible things to Betty, cursing at her and making fun of her. He treated her as if he hated her.

4. Betty was sick a lot while she was pregnant for the twins Robert Wayne and Betty Jane. She stayed in bed almost the whole nine months and I believe at one point, she had uremic poisoning. Robert was no help to her and seemed very unconcerned about her health.

5. By the time the twins were born, Betty had suffered about five years of Robert's abuse. He had her in such a state of constant misery that she was desperate to get away at any cost. She paid for her freedom from him with her life and Robert Sawyer didn't even care. My sister wasn't in her grave but three weeks when he sent his four year old little girl over to my house with a note for me. The note was asking me to marry him. I just folded it up and didn't say a word. I really couldn't believe that he had had so little feelings for my sister that he thought he could just replace her like an old mule. I knew one thing though, he would never get a chance to destroy me like he did my sister.

6. When my sister died, Robert poured all of his hate and anger on little Robert Wayne. As soon as Robert Wayne was old enough to walk and talk, his father had him doing chores all day long. By the time he was eight years old or so, he was having to do things like clearing land, really men's work. Robert treated his son like a slave with never a kind word or show of any love or affection.

My husband would always say how he could hear Robert cursing Robert Wayne all the way across the road. Robert Wayne was very badly mistreated by his father and cruelly beaten at the drop of a hat. I'm sure that he never felt anything but hate and scorn from his father.

7. Robert Wayne quickly grew into a rather withdrawn, odd child. I remember an incident when he took all of my sister-in-law's and my underwear out of our dresser drawers. When we found them, the crotches had been cut out of the underpants and some of them were burned. I always felt a little uncomfortable around Robert Wayne after that. To me, that indicated a problem that his father should have taken him to a doctor for, but of course all his father ever did was beat him.

8. When Robert Wayne grew up and got married, he and his wife split up and he got custody of their child, Scotty. Scotty lived with Robert Wayne's father and step-mother while Robert Wayne worked out of town. Robert has abused Scotty just like he did Robert Wayne. He has beaten him, forbidden him food, punched him in the face and head, and even knocked him out.

9. Robert Wayne has lived a tormented life. He grew up without a mother or really even a father. He went through years of abuse and neglect, probably never feeling loved or wanted or anything but scared and hated. I wish that his attorneys would have contacted me at the time of his trial so that I could have testified to what I know about his life.

Further affiant sayeth naught.

/s/ Jeannie Warf
Jeannie Warf

Sworn to and subscribed before me this 30th day of September, 1990

/s/ Vernon V. Dollahite
NOTARY PUBLIC

My commission expires: My Commission Expires May 18, 1991

State of Arkansas

County of Mississippi

AFFIDAVIT OF VIRGINIA KIMBERLIN

1. My name is Virginia Kimberlin. I am over eighteen years of age and am a resident of Mississippi County. I am retired from a career in social services and have been a Councilwoman on the Joiner City Council for the past two years. I am Robert Wayne Sawyer's aunt. I am his father's oldest sister.

2. I grew up on my father's farm in rural Tennessee. There were three of us children: me, my brother Robert, and my sister Mildred. We lived with my father and mother in a two room house without running water, electricity, or indoor plumbing.

3. My brother Robert was a cruel and hateful person from childhood. He would get my sister and me alone and terrorize us then laugh about it. He always got away with what he did too, because my daddy protected him and prevented him from being punished. Robert grew up believing that he could do anything he wanted to other people and get away with it.

4. Robert married Betty Montgomery, a girl who had grown up across the road from us. From the beginning, he treated her like dirt, a piece of property that he could do anything he wanted with. I don't think he ever showed her a loving word or touch. He talked to her like she was his worst enemy instead of his wife and treated her like a dog. He raped her all the time and he didn't care who knew it. He had no respect or feelings for her.

5. Betty suffered a lot with my brother and when she got pregnant the second time, her problems multiplied. She was very sick throughout her pregnancy with kidney trouble and had to be in bed almost the whole time. She took a lot of prescription drugs while she was pregnant. She had a very difficult delivery, and nobody even knew she was going to have twins until the second baby was born. I think she lost her mind then, especially since there was hardly enough money for one baby, much less two. When she came home from the hospital, she seemed to get more and more depressed. My brother continued abusing and mistreating her. One day, she picked up a fire poker and it seemed that she was going to try to kill herself or the twins with it. My mother stopped her just in time. A few days later, Betty's doctor, Dr. Cates examined her. He told my mother and brother that Betty needed to be seen by a psychiatrist. Betty overheard this and flew into a rage, saying she wasn't crazy and didn't need a psychiatrist. The next morning, she went outside and sat in the backseat of the family car. She propped the shotgun up against the front seat, aimed it at her heart, and pulled the trigger with her toe. She died immediately.

6. My mother had a nervous breakdown after Betty died. She really loved her and I think she felt bad about the way Robert had mistreated her. Also, there was now three motherless children in the house, two of them only four months old. By this time, I was married and had two older sons. I offered to take one of the twins to stay with me until the family situation settled. Betty Jane came to live with me and Robert Wayne and his older sister Glenda Sue stayed with their father and grandparents.

7. I am so glad that I was able to take Betty Jane with me and rescue her from her father's abusiveness. With Betty Jane and her mother gone, however, little Robert Wayne seemed to bear the full weight of his father's anger and frustration. Robert worked him in the fields and clearing land like he was a grown-up. Nothing Robert Wayne could ever do was right according to his father. From third grade on, he was in special education classes and his father made fun of him and called him names for that. Robert also called that poor child things I wouldn't repeat. He would beat him with anything he could get his hands on. I remember once, after Robert Wayne had been horse whipped by his father, I told him something about not treating that boy so bad and he told me that Robert Wayne was the only thing in the world that was his and that he could do anything he wanted with.

8. I know that all those beatings and humiliation left their mark on Robert Wayne. He was such a loner, even as a little boy, partly I think, because his father wouldn't let him go places and do things with the other boys. When other cousins would visit the house, Robert Wayne was ordered to work, usually doing meaningless chores, so he was never allowed to play with them. He stole his aunts' underclothes and destroyed them. He had no self-confidence and was wetting the bed still when he got married. I don't believe Robert Wayne ever felt loved or wanted or secure with his family. His father only showed him hate. To be honest, his father really never has shown much of anything but meanness to anybody. The only ones Robert Sawyer ever loved were his two dogs and Robert Wayne was so desperate for his daddy's love and

attention, that he stole the dogs and took them out on the road hitchhiking with him.

9. There have been a lot of hard feelings and bad things in the Sawyer household. I wish my mother was still alive so that we could ask her about all of the other details of Robert Wayne's childhood. There are things that we will probably never know and his father is not talking.

Further affiant sayeth naught.

/s/ Virginia Kimberlin
Virginia Kimberlin

Sworn to and subscribed before
me this 1st day of October, 1990

/s/ Joe Ann Ford
NOTARY PUBLIC

My commission expires: MY
COMMISSION EXPIRES 11-15-92

(SEAL)

State of Tennessee

County of Shelby

AFFIDAVIT OF NELL MONTGOMERY FRAKES

1. My name is Nell Montgomery Frakes. I am a resident of Shelby County and am over eighteen years of age. Robert Wayne Sawyer is my nephew. I was married to his mother's brother.

2. Ever since I have known Robert Sawyer, Robert Wayne's father, he has been mean and abusive to everyone he comes in contact with. He has never had a kind word or feeling for anybody. All his life, he has bullied and beaten his family from his son Robert Wayne to his second wife, Mott and his grandson Scotty. Robert always demanded that things be exactly the way he said and that no one do anything that he didn't say was okay. I remember a terrible beating that he gave his second wife once. He had a rule that when he was working out of town, she couldn't use the family car. If she had to go to the store or doctor while he was away, she would have to get a neighbor to take her or walk. One day when he came back home and checked the mileage of the car, he found that his wife had used it to go into town. He ran into the house and grabbed her by her hair and dragged her out of the house, across the front yard, beating her and screaming at her the whole time. He was just that kind of man who always had to prove that his word was law.

3. I think little Robert Wayne led a miserable life. There was something not right about him. He was always withdrawn and seemed to have no self-confidence. I believe his father was the reason Robert Wayne acted the way he

did. Robert was terribly abusive to Robert Wayne, he physically beat him and constantly cursed him.

4. I became more convinced than ever that Robert Wayne needed help when I discovered that he was taking my underwear, ripping them up, and masturbating on them. He was about twelve years old. My sister-in-law told me he did the same thing to her underwear. I was very concerned about him, and knew he needed help but I also knew that his father wouldn't do anything to get help for him.

5. None of Robert Wayne's attorneys contacted me before his trial but if they had, I believe I could have told them these things about his life that would have helped them and the jury understand him better.

Further affiant sayeth naught.

/s/ Nell Montgomery Frakes
Nell Montgomery

Sworn to and subscribed before
me this 1st day of October, 1990

/s/ Illegible
NOTARY PUBLIC

My commission expires: 11-4-90

State of Tennessee

County of Shelby

AFFIDAVIT OF MABLE SCHUMACHER

1. My name is Mable Schumacher. I am a resident of Shelby County and am over eighteen years of age. I am Robert Wayne Sawyer's aunt. His mother was my younger sister.

2. When I was growing up, my family lived right across the road from the Sawyers. I was best friends with their two daughters, Mildred and Virginia. I remember Robert Sawyer (Robert Wayne's father) when we were children. He was extremely mean and seemed to take pleasure in physically hurting his sisters and I tried to stay away from him as much as I could.

3. As we grew up, I finished high school and went off to business college in nearby Memphis where I lived until I married. couldn't believe it when I heard that my beautiful and talented sister Betty had married Robert Sawyer against the wishes of my parents. She moved in with him and his parents and then their children all lived together in a two room shack without even a bathroom.

4. Each week when I visited home, I would see Betty and I could tell that she was under a lot of tension. Robert had such a mean way about him, with a dirty mouth and violent temper. If something didn't get done exactly the way he wanted it, he would fly off into a rage. I never saw him be any other way than overpowering and contemptous [sic] with Betty.

5. Robert Sawyer killed my sister, just as sure as if he had pulled the trigger himself. His overbearing personality, hatefulness, and abuse destroyed my sister's spirit and her will to live. He cared so little about Betty that right after she died, he sent a note with his little daughter to my other sister still at home, asking her to marry him! I remember feeling sorry for my nieces and nephew being left with such a heartless parent.

6. As time went on, I would see my nephew Robert Wayne and my niece Glenda Sue when I visited my mother every week. Robert's twin Betty was sent to live with Robert's sister Virginia soon after her mother's death and she never returned to live with the family.

7. From early on, Robert Wayne was a withdrawn child, very reserved and without any self confidence. I think he was told by his father that he was dumb and couldn't do anything right so often that he believed it himself. There was something not quite right about Robert Wayne. At the time I thought he was just lonely and felt unloved, but now I realize that he was mentally disturbed. When he was about eight years old, he took all of his Aunt Jeannie's and Aunt Nell's underpants from their dresser drawers and destroyed them. His father should have known then that there was a problem, but I don't think he paid Robert Wayne much attention except to berate him and or that he even much cared if something was wrong.

8. When Robert Wayne's grandfather died things got much worse. Robert's own mother said he was just a mean individual. My niece Glenda Sue ran off and got married, even though she was only a teenager herself. I remember her telling me years later that she would never

have done it but when her grandfather died, she had to get away from her father. I imagine when she left and there was nobody else for Robert to beat on, Robert Wayne felt the full force of his anger and hatefulness.

9. As Robert Wayne grew into a teenager and then a man, I didn't see him very often. He married at a young age and fathered a son, Scotty, who he got custody of when his marriage ended. While Robert Wayne worked on the boats, Scotty stayed on the farm with his great-grandmother and Robert where he was mistreated just as his father had been. Now that Scotty is grown, he and his grandfather Robert hardly speak to each other.

10. I find it hard to believe that my nephew Robert Wayne did all the things that the District Attorney said he did in this crime. I never knew Robert Wayne to be mean or cruel, even though he was certainly treated that way growing up. I can't help but feel that if only his father had showed him some love and attention instead of the abuse he heaped on him, maybe Robert Wayne wouldn't be on Death Row today.

11. I've never been contacted before by any of Robert Wayne's attorneys, but if I had, I would have spoken with them freely about Robert Wayne's life and I certainly would have gone to court and told the jury everything I knew and asked them to spare his life.

Further affiant sayeth naught.

/s/ Mable Schumacher
Mable Schumacher

Sworn to and subscribed before me this 27th day of September, 1990

/s/ Carol Hendrix
NOTARY PUBLIC

My commission expires: Aug. 30, 1994

STATE OF LOUISIANA

PARISH OF JEFFERSON

Affidavit of Diane Thibodeaux

1. My name is Diane Thibodeaux and I am a resident of Jefferson Parish, Louisiana. I have lived in Gretna, Louisiana all my life.

2. I have known Cynthia Shano Schoennagel since we were young. We are very close friends – we call each other cousins. Whenever Cindy has any trouble, she heads over to my house.

3. I knew Cindy back in 1979 when she and Robert Sawyer were living together. The two of them and her boys, Wayne and Troy, stayed with me in my house for a one month period, so I got to know Bobby pretty well. Bobby was kind to Cindy and kind to the boys. I never saw Bobby mistreat the boys in any way, and they quickly became very attached to him. They called him "Daddy." When the four of them went on a trip to Memphis, Tennessee, where Bobby's family lived, I allowed my 15-year-old daughter to go along with them. I knew I could trust Bobby to take care of her, and he did. She had a great time – Bobby even took them all to see Elvis Presley's mansion.

4. I was also very close to Wayne and Troy, Cindy's two boys. From the time they were born, I took care of them whenever Cindy needed me to. They called me "Nanny," and played with my younger children, who are about their same age. Cindy had an older child, Stacey, who she never raised. Cindy's sister, Sylvia Champagne,

had taken her in at her home and Stacey never returned to live with her real mother. Because she had lost Stacey, Cindy was always very afraid of losing the boys.

5. In 1979, on the day the girl was beaten up so badly that she later died, Cindy came to my house with Wayne and Troy. She was white as a ghost, shaking, and upset. She told me what had happened and said "Troy's not right, Diane, help me." Troy wasn't right – he was all doped up. His eyes looked like glass and he looked like he didn't know anyone. We didn't know what to do. I gave Troy soup and even gave him coffee to try to bring him out of it. It took us 3-4 days to get him right again.

6. Cindy told me that a man named Chuck Lane had been over and that he and the girl were drinking. She though the girl or Chuck might have had drugs. She went out for a while and when she left the house, everything was okay. When she came back, there was a lot of wine (MD 20/20) there. Cindy said Bobby grabbed her and told her to take the kids and get in the back room and stay there or she would be next. Cindy said she didn't know how to take that. She didn't know if Bobby meant to save her or hurt her. But Cindy said she stayed in the back room until her sister and her sister's son Tommy drove up, and then she yelled to her sister and that's how she got out.

7. Little Wayne, who was four at the time, saw what happened. He started talking about it. I was present when a plain clothes policeman came over to Cindy's mother's house and talked to Wayne. When the policeman came in, Wayne saw his gun in a shoulder holster and reacted very strongly to it. He wouldn't go near the

policeman and would only talk to me. Cindy sat on the couch with the policeman and I sat in the armchair across from them. Wayne stayed with me. He told us that there was a man with a gun and that "they" took stuff in a "blue and yellow can" and poured into the "shiny thing you put cigarettes in." Wayne said the man stood over the girl and "they" put it on her. Then it "went poof."

8. Wayne kept saying "they," so I asked him if Daddy did that. (Wayne called Bobby Sawyer "Daddy.") Wayne said no, "Daddy tried to help the lady" and he showed us with his hand how the man slapped Bobby back. Wayne said, "Daddy fell into the chair, like this," and he showed us how Bobby fell back into the chair. He said that there was another man there who left in a car before Cindy came back. He said it was him and the other man who had done it.

9. The policeman took notes about what Wayne said. Then Wayne showed us where the "shiny thing" was – in the trash. The policeman went through the trash and found the bottom half of a cigarette holder, the girl's panties, two or three empty bottles of MD 20/20, and a can of lighter fluid.

10. I know that Cindy went to court for Bobby's trial. I don't know what she said. I have been told that she gave a different story. That doesn't surprise me – Cindy says different things at different times. When an article came out about the trial, Cindy showed it to me and said she hadn't said what the article said she said.

11. I believed what Wayne told us, especially when we found everything in the trash. It was just what Wayne had said it would be. I never got involved because my

husband told me not to. I don't want Chuck Lane coming after me. I prefer not to have address known because of Chuck Lane.

Further affiant sayeth naught.

/s/ Diane E. Thibodeaux
Diane E. Thibodeaux
Jefferson Parish, Louisiana

Sworn to and subscribed before me on
this the 25th day of October, 1990.

/s/ illegible
Notary Public

My commission expires: April 91

State of Louisiana

Parish of St. Bernard

AFFIDAVIT OF CONRAD WYMAN

Conrad Wyman, after being duly sworn did say:

1. My name is Conrad Wyman. I am a resident of St. Bernard Parish and am over eighteen years old. I have known Cindy Shano for about thirteen years.

2. I first met Cindy at the Monaco lounge on the Westbank in 1977. I remember it was her birthday and she was in there with her mother, Bertha. The three of us drank together all night.

3. I began dating Cindy and eventually moved in with her. I felt sorry for her and her two kids, little Wayne and Troy. Cindy was real afraid of losing her kids because she had a daughter that her sister, Sylvia, was raising. The Welfare Department had arranged it so that Cindy could only visit the girl at her sister's house, she could never come over to Cindy's. Welfare was always coming around and checking up on little Wayne and Troy, one time twice in one week. Cindy would cry and get upset and shaking after they'd come around. .

4. I often though if it wasn't for me being around, the kids would have been better off away from Cindy. She hit them too much. Cindy drank a lot and both she and her mother (who she lived with) claimed to be sick all of the time and were always going to different doctors for prescriptions. Cindy had a whole suitcase full of pills that she would take. She never put food on the table, or kept the kids clean. Even though she was getting Welfare, she

never had money to buy them clothes, or diapers. I bought them the things they needed and when I was off the boat, I would cook for them too.

5. I worked on the boats as a deckhand and I would go out on the river for two weeks and be off for one. While I was out, Cindy would go and hang out in the bars around Gretna and Westwego. My friends would tell me they saw her in the Monaco or the Hourglass or the Sahara almost every night drinking with whoever was in there buying that night.

6. I worked on some of the same boats as Charles Lane, but I knew him as Chuck. I also knew him from going to the same bars as me and Cindy. I know that Cindy and Chuck Lane knew each other too.

7. Cindy was like two different people sometimes, okay one minute and crazy the next. The police were always out at her house for one thing or another with her or her mother. I remember two of the police officers who came out a lot were Officers Giroir and Folse. They would make a report and never follow up on it.

8. In 1978, Cindy and I broke up and I didn't see her again until early 1980 after the woman had been killed at her house. I remember sitting on Cindy's front porch with her. I just happened to be passing by and saw her with a friend of mine, so I stopped to chat. She told me about the killing. She said that the woman had been stabbed with an ice-pick, her nipples had been cut off, and that she was set on fire.

9. Cindy told me that the two men who did it hadn't gone to trial yet but when they did, she would be testifying against them. She said the prosecutor wanted to charge here with the crime, but that she made a deal that if she would testify against both of them she would not be prosecuted. She said she was afraid she was going to lose her kids if she didn't go along with them.

10. I have only seen Cindy a couple of times since that day, but each time she has mentioned the killing. Its like it is always on her mind.

Further Affiant Sayeth Naught

/s/ Conrad Wyman
Conrad Wyman

Sworn to and subscribed before me this
9th day of November, 1990

/s/ illegible
NOTARY PUBLIC

My commission is for life

STATE OF LOUISIANA

PARISH OF JEFFERSON

Affidavit of Sharon Deshotel

1. My name is Sharon Deshotel and I am a resident of Jefferson Parish, Louisiana. I am a head injury technician. I have known Cynthia Shano Schoennagel and her husband Mervin for the past seven years. My husband and I get together with them from time to time.

2. I did not know Cindy in 1979, when the babysitter was murdered in her house, but she has talked to me about the incident. On many occasions over the years, as recently as last month, Cindy has explained that she did not get in trouble for what happened because she turned state's evidence. She lives in fear of the men getting out of prison and coming after her. I have never doubted that Cindy did turn state's evidence because I know that she is well-connected to the mayor and to police in Gretna.

3. When Cindy talks about what happened that day, she tell [sic] different stories at different times. Sometimes she says she wasn't there at all, that everyone was drinking and she left to go do something. Sometimes she describes all kinds of horrible things that the men did to that woman, like cutting her nipples off, or using a hammer and icepick to rape her and then raping her themselves. I have often wondered why she would leave the house when her two children were there with everyone drinking. If she were there, I don't understand shy she couldn't at least have opened up a window and screamed, or gotten out of it. I have been in her house, and it wouldn't be hard.

4. I have been told that a jury believed what Cindy told them about what happened that day. As far as I'm concerned, based on all the things Cindy has said to me at various times, no one should go to prison based on what Cindy says. She changes it from day to day, and I know she turned state's evidence in order to save herself. That's the one part of the story that never changes.

5. Cindy seems to be haunted with guilt about the murder that occurred in her house. She falls apart whenever articles appear in the paper about it. Since September of this year, she has been much more affected than usual. She is very nervous about being subpoenaed to court again. Recently, there was an article in the paper with a big picture that had to do with Robert Sawyer. The next weekend, we all went on a fishing trip. Cindy went off on her own for about 2½ hours and just cried, the whole time. It had something to do with the article.

6. Just last week, Cindy showed up at my door at 2:00 a.m. and asked me to take her to the hospital. She was in terrible shape. On the way to the hospital she was talking out of her head about being subpoenaed to court and about the men coming after her. I don't think it is just bad memories of what happened either. It seems to go much deeper than that.

7. Knowing Cindy, I can say that she really seems to have two personalities. Sometimes she comes off sweet as can be, but other times she is calculating and mean. You never quite know what she is up to. I could imagine her being involved in the crime and I could also imagine her lying to protect herself. I think that that is what is causing

her so much trouble right now, like I said, a guilty conscience.

Further affiant sayeth naught.

/s/ Sharon Deshotel
Sharon Deshotel
Jefferson Parish, Louisiana

Sworn to and subscribed before me on
this the 25th day of October, 1990.

/s/ illegible
Notary Public

My commission expires: April 91

STATE OF LOUISIANA
PARISH OF JEFFERSON

AFFIDAVIT OF THOMAS P. CHAMPAGNE, SR.

Thomas P. Champagne, Sr., after being duly sworn did say:

1. My name is Thomas Champagne and I am a resident of Jefferson Parish, Louisiana. I am Sylvia and Peter Champagne's son and Cynthia Shano Shoennagle's nephew.

2. I knew Fran Arwood prior to her murder in September, 1979. I had just seen her the previous day. My mother and I found her in Cynthia's house. Cynthia, Bobby Sawyer, Chuck Lane, and Cynthia's two kids, Wayne and Troy, were also in the house. I testified at the trials of Chuck Lane and Bobby Sawyer.

3. After the police arrived on the scene they took Bobby Sawyer out back and I saw one officer hit him. I didn't see what happened after that because other officers told us to go back around the front of the house and we did. At the time, I didn't much are what they did to him. I had already tried to go after him myself, but by mother wouldn't let me.

4. My mother, Cynthia, and I stayed outside the house for quite a while. I remember it took me a long time to calm down from what I'd seen. The police asked us questions and other police officers were inside the house. It wasn't until around dark that Cynthia, my mother and I all went to the station, where police took our statements. While we were outside the house a lot of

police were there. I would estimate that there at least 10 or more officers, counting both the uniform officers and plain clothes detectives.

5. I never talked to Cynthia directly about what happened in that house. She wasn't making much sense the day it happened. Later, she just talked to my mother. I've always felt she must have been involved. My mother, told me some of what Cynthia said and it doesn't add up to me. Cynthia told my mother that she was locked in the back room, and there aren't any locks on that door. She also told my mother that the men let her out to go get something, but then she had to go right back to the house. I don't understand that, either.

6. My mother told me that Cynthia had a deal to testify against Lane and Sawyer so she wouldn't get in trouble herself. That makes more sense to me than any of the stories I heard.

Further affiant sayeth naught.

/s/ Thomas P. Champagne, Sr.
Thomas P. Champagne, Sr.
Jefferson Parish, Louisiana

Sworn to and subscribed before me on
this the 4th day of November, 1990.

/s/ illegible
Notary Public

My commission expires:

STATE OF LOUISIANA

PARISH OF JEFFERSON

AFFIDAVIT OF PETER J. CHAMPAGNE, JR.

Peter J. Champagne, Jr., after being duly sworn did say:

1. My name is Peter Champagne and I am a resident of Jefferson Parish. Sylvia Champagne was my wife. She passed away on February 11, 1982, just before Valentine's Day.

2. My wife testified at the trials of Bobby Sawyer and the other man who was accused of killing the girl over at the Shanos' house, on Porter Street. All I know about what happened is what my wife told me. I myself never got involved in anything that was going on.

3. My wife told me that Cynthia Shano made a deal to testify against the two men in exchange for not being arrested for the crime. My wife told me that she and Cynthia had a meeting with the D.A. I think my wife knew the D.A. She also knew a lot of police. We have relatives who are on the Gretna police force.

4. I knew Bobby Swayer before he was arrested. I never saw him mistreat either Cynthia or the children. He looked like he could have temper, but I only say that from his looks. Sometimes you can tell by the way a man carries himself. It surprised me that he was involved in this kind of crime.

5. I prefer not to comment on anything I have heard about what happened on that day and what I think about

it. I don't see Cynthia Shano anymore unless I happen to run into her, but she is still my relative.

Further affiant sayeth naught.

/s/ Peter J. Champagne, Jr.
Peter J. Champagne, Jr.
Jefferson Parish, Louisiana

Sworn to and subscribed before me on
this the 4th day of November, 1990.

/s/ illegible
Notary Public

My commission expires:

State of Florida

County of Escambia

AFFIDAVIT OF JERRY WHITE

1. My name is Jerry White. I am a resident of Escambia County and am over eighteen years of age. Robert Wayne Sawyer is by brother-in-law. I am married to his oldest sister Glenda.

2. I will never forget Robert Sawyer's trial. It seemed like a nightmare with no one trying to help Robert and all the cards stacked against him. The D.A. Phillip Boudousque wanted the death penalty at any cost for Robert and even though he knew Cynthia Shano was guilty, he didn't care. At one point we were standing outside the courtroom on a break and Phillip Boudousque said to me that he knew Cynthia Shano was guilty but two ducks (Sawyer and Lane) were better than none. Now I am a Vietnam Veteran. I fought in the war because that was what had to be done and I know and respect the fact that everyone has a job to do. However, I have been extremely bothered over the last ten years about the railroading job District Attorney Phillip Boudousque did on Robert Sawyer while Cynthia Shano walked free.

3. When Robert was arrested, we began talking with Cynthia Shano about what happened. We had several phone conversations with her in which she stated that Robert was innocent, had been knocked out drunk when it happened, that she and the kids loved him and were going to stand behind him. When Frances Arwood died, she completely changed her tune. The last time I ever spoke with her was either the day Ms. Arwood died or

the day after. She told me that the D.A. had instructed her to never speak with us again. She also said, "I'm not going down for nobody. I'm going to cover my ass, no matter what it takes. I have this friend B.J. Miller who's going to help me."

4. I believe that brother-in-law didn't stand a chance from the beginning. When I first talked with his attorney, James Weidner on the telephone about two weeks before the trial, he told me that Robert had been offered a life sentence but had turned it down. I told that Robert had problems understanding things and maybe he didn't understand the plea bargain and could my wife and I explain it to him again. Weidner told me that it was too late and the life sentence was no longer available.

5. James Weidner didn't ask me about what I meant about Robert not understanding things too well. In fact, he didn't ask me anything about Robert or his background. We talked for about fifteen minutes or so that day and several days later, my wife and I got a letter from him asking us to come to the trial. I spoke with him once more by telephone only to let him know that I needed a subpoena issued so that the military would let me come to court. When we met with him the night before the trial, we only spent an hour and a half with him. Even then, I asked him about the plea bargain and couldn't we approach the D.A. and ask him to offer it again after we spoke with Robert. He told me that there was no way to change things, that the wheels were rolling and we were going to trial. It was too late for a plea bargain now.

Further Affiant Sayeth Naught

/s/ Jerry White
Jerry White

Sworn to and subscribed before me this
20th day of October, 1990

/s/ illegible
Notary Public

My commission expires:
My commission Expires April 28, 1991

STATE OF LOUISIANA

PARISH OF JEFFERSON

Affidavit of Samuel Shano

1. My name is Samuel Shano, Jr. and I am a resident of Jefferson Parish, Louisiana. I have lived in Jefferson Parish all my life.

2. Cynthia Shano Shoennagel is my ex-sister-in-law. She was married to my brother, Wayne Shano. I have known Cindy since we were both young. I used to have relatives who lived in the neighborhood of her mother's house, on 928 Porter Street in Gretna, and so I spent a lot of time in that area.

3. I am familiar with the events that led to the conviction of Robert Sawyer for the first degree murder of Frances Arwood. In 1979 my nephews, Wayne Shano, Jr. and Troy, were living with Cindy on Porter Street, and were present when the crime occurred. At the time, they were four and two years old. The boys have not lived with their mother since 1981, when they were taken from her and placed in a foster home. Not long after, my brother gained temporary custody of his children. The following year, my brother was awarded full custody of his children.

4. Following Frances Arwood's death, Wayne continued to have nightmares about whatever he witnesses that day. My brother and mother took him to see a psychiatrist for a while. Since then, apparently the memories have faded. When Wayne talks about his early childhood (he is now 15 years old), it seems to all blur

together. He remembers some friends in the neighborhood, a few car accidents he got into with his mother, and some of her boyfriends, but other than that, I don't think he has a clear memory of what went on in that house.

5. It is common knowledge in the area that Cindy testified against Charles Lane and Robert Sawyer in exchange for not being prosecuted herself. People know that Cindy was in and out of her house all morning on the day the crime occurred and that she never asked anyone for any help. The checker working at Ripp's, a local store up the street from her house, saw her two or three times that morning buying cigarettes and wine. She also went into a bar near there at one point. People who know Cindy know that she could easily be involved in something like that.

6. I have been told by two different people, on two different occasions, that Cindy told them she turned state's evidence. A man I know only by the name of Conrad, who was Cindy's boyfriend before the murder and then again after the murder for a short period of time, told me that when he and Cindy were on good terms, she told him she had turned state's evidence. A woman named Sharon, who is a friend of Cindy's and who I see occasionally, also told me that Cindy says she turned state's evidence.

7. The fact that she was given the opportunity to turn state's evidence has always made sense to me. Some members of Cindy's family are very well-connected with the Gretna police. It would not surprise me at all that they gave her the chance to work out a deal. Sawyer and

Lane weren't from around here and couldn't have pulled those kinds of connections.

Further affiant sayeth naught.

/s/ Samuel Shano
Samuel Shano

Sworn to and subscribed before me on
this the 25th day of October, 1990.

/s/ illegible
Notary Public

My commission expires: April 91

State of Louisiana

Parish of Jefferson

AFFIDAVIT OF BETTY SHANO

1. My name is Betty Shano. I am a resident of Jefferson Parish and am over eighteen years of age. My son, Wayne Joseph Shano, Sr. was married to Cynthia Shano.

2. I've known Cynthia Shano ever since she was a little girl. My husband's mother lived a block away from Cynthia's house and his aunt, Louise Riley, lived across the street. I was commonly known around the neighborhood that Cynthia's mother was an alcoholic and popped a lot of prescription pills. Maybe it was because she was around them so much, but by the time Cynthia was a teenager, she was taking a lot of prescription drugs.

3. My son got involved with Cynthia when he was only eighteen years old. He had been dating her for about six weeks when she told that she was pregnant from him and wanted to get married. I remembered how much Cynthia used to connive and lie when she was younger and I told my son not to marry her because I didn't believe she was pregnant. My son was not a responsible person and he wouldn't listen to me. He married her anyway, but I was right. Later, Cynthia said she'd had a miscarriage. That was just how Cynthia was, she would tell you anything to get what she wanted even if it was a bold-faced lie.

4. Eventually, Cynthia had my two grandsons, Wayne, Jr. and Troy. From birth, Cynthia was not a very living mother to them. She neglected and physically abused them. She had another child, a daughter, from a previous

relationship that she had treated the same was. [Illegible Words] the girl away when she was just a baby and raised her. The child even took Sylvia's last name. She was downright mean to my son as well and by 1977, Cynthia and my son had separated. Cynthia had custody of the two children.

5. The first time that Cynthia Shano was reported for abusing and neglecting Wayne, Jr. and Troy was in the winter of 1977. An old friend of our family lived across the street from Cynthia's mother's house on Porter Street. She called me one afternoon to let me know that Cynthia and the kids were living in an abandoned house on the corner of Porter and Hancock Streets. There was no running water or electricity at the house and the children had no coats or sweaters, just their little short sleeve shirts and pants. By the time the police got out there, Cynthia got the kids over to her mother's and lied to the officer who came out to investigate. A report was filed and the Welfare Department began to keep an eye on her.

6. By 1981, my grandchildren had been through hell. They had seen whatever went on in that house the day Frances Arwood died, and Wayne, Jr. had nightmares about that for a long time. The boys were constantly shuttled from one house to the next. Whenever I saw them, they looked underfed and not cared for. She would leave them for days and weeks at a time with her sick mother who couldn't hardly get out of bed much less take care of two little boys. It was one of these times, when she left, that the Welfare Department came in and took the boys.

7. Cynthia had left Wayne, Jr. and Troy with her mother for nearly a week when the home health-care nurse came to take care of her. The children were running wild, unfed and barely clothed. The nurse called the Welfare and the children were immediately placed into the custody of the state and in a foster home. After being investigated by the children's social worker, my son got custody of the boys on June 26, 1981 with Cynthia having twelve hour visitations on Sundays.

8. Cynthia had only taken the boys for a couple of Sundays when they came back all beaten and bruised. They were filthy dirty and said they hadn't had anything to eat all day. We took pictures of their bruises and gave them to the social worker, Birdie Johnson. She went to court and got the Judge to order supervised visitation at the Welfare Office and Cynthia never showed up. Then he ordered that she be allowed to have supervised visitations with the boys at our house, but Cynthia never came to see her children after that either. My son was awarded permanent custody in 1982.

9. Through the courts we were able to get psychological help for Wayne, Jr.. [sic] Troy never seemed to remember what happened when Frances Arwood was killed, But Wayne, Jr. continued to have nightmares. The psychologist saw Wayne, Jr. for awhile and told us that eventually he would put the memories behind him. Recently I asked Wayne, Jr. about it and he seems to have forgotten the details of that day.

10. I've often wondered about the killing of Frances Arwood and what part Cynthia had in it. The details of the crime that I heard sound like something Cynthia

would be involved in, mean and cruel. She was that type of person. The other thing that has made me wonder is what my sister-in-law told me about the day the crime happened.

11. My sister-in-law worked at Ripp's Supermarket which was just down the street from Cynthia's on Hancock Street. She told me that she saw Cynthia two or three times the morning of the crime when she came into the store to buy liquor. She said she even asked Cynthia that day how she and the boys were doing and she said they were all doing alright. She said that the last time she saw Cynthia in the store that day was about a half an hour to forty-five minutes before they heard the ambulances going to her house.

12. I have heard that reason Cynthia didn't get charged with the murder was because she turned State's evidence. I wasn't at the trial so I really don't know what she said, but I do know that Cynthia presents herself as such a pathetic creature that people tend to feel sorry for her and believe what she tells them. I also know that her family had a lot of friends on the Gretna Police Force. [Illegible Words] It wouldn't surprise me for Cynthia to say anything she needed to keep herself out of trouble.

Further Affiant Sayeth Naught

/s/ Mrs. Betty Shano
Betty Shano

Sworn to and subscribed before me
this 25th day of October, 1990

/s/ illegible
Notary Public

My commission is for life.

SUPREME COURT OF THE UNITED STATES

No. 91-6382

Robert Wayne Sawyer,

Petitioner

v.

John P. Whitley, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 14, 1991

91-6382

91-6382

No. ~~91-8362~~

Supreme Court, U.S.
FILED
DEC 30 1991
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In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

versus

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

* NICHOLAS J. TRENTICOSTA
R. NEAL WALKER
SARAH L. OTTINGER
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

Counsel for Petitioner

Of Counsel:

JOHN H. HOLDRIDGE
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. What is the appropriate standard to be applied when determining whether the "fundamental miscarriage of justice" exception, *Smith v. Murray*, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition?

2. Under the standard to be used when determining whether the "fundamental miscarriage of justice" exception set forth in *Smith v. Murray*, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition, should the focus be strictly on the defendant's legalistic "eligibility" to be sentenced to death, and fail to require a fact-based examination of the accuracy of the jury's decision, including whether: (i) the jury was presented with false facts; and (ii) the jury was *not* presented with true, mitigating facts?

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CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 945 F.2d 812 (5th Cir. 1991), and is reproduced in the Joint Appendix (JA) at 309-338. The court modified the third paragraph, Section II.E., of the opinion on November 12, 1991. It is reproduced in Appendix B.

The memorandum opinion of the United States District Court for the Eastern District of Louisiana is reported at 772 F.Supp. 297 (E.D. La. 1991), and is reproduced at JA 284-308.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 10, 1991 and modified on November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Case involves the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;

the Eighth Amendment, which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

This case also involves Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different

grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The case also involves the following Louisiana statutes, which are reprinted in Appendix A:

Louisiana Revised Statute 14:30.

Louisiana Revised Statute 14:30.1.

Louisiana Code of Criminal Procedure, Article 905.2.

Louisiana Code of Criminal Procedure, Article 905.4.

Louisiana Code of Criminal Procedure, Article 905.5.

Louisiana Code of Criminal Procedure, Article 905.6

Rules of the Supreme Court of Louisiana, Rule 28.

STATEMENT OF THE CASE

i. Course Of The Proceedings[1]

Mr. Sawyer's conviction of first degree murder and sentence of death were affirmed on direct appeal. *State v. Sawyer*, 422 So.2d 95 (La. 1982). On application for writ of certiorari, the Court vacated the sentence and remanded the case in light of *Zant v. Stephens*, 462 U.S. 862 (1983). *Sawyer v. Louisiana*, 463 U.S. 1223 (1983). On remand, the court affirmed the conviction and sentence. *State v. Sawyer*, 442 So.2d 1136 (La. 1983).

Mr. Sawyer sought collateral review in state court. The Louisiana Supreme Court remanded the case to the state district court twice for hearings on ineffective assistance of counsel. *State ex rel. Sawyer v. Maggio*, 450 So.2d 355 (La.

[1] References in this brief are being made to the following: record on appeal in the Court of Appeals as "R"; Joint Appendix as "JA"; trial record as "TR"; and state post conviction hearing as "SH".

1984); *State ex rel. Sawyer v. Maggio*, 468 So.2d 554 (1984). Ultimately, the supreme court denied discretionary review by a vote of 4 to 3. *State ex rel. Sawyer v. Maggio*, 479 So.2d 360 (La. 1985).

Mr. Sawyer then filed a writ of habeas corpus in the United States District Court on January 20, 1986, wherein numerous issues were raised including a broad based claim of ineffective assistance of trial counsel. In support of the claim that trial counsel failed to provide effective assistance in the penalty phase, prior habeas counsel submitted her affidavit which listed the names and addresses of five family members who "could have provided" trial counsel with information, and noted that Mr. Sawyer had been "confine[d] at the State Mental Hospital in Bolivar, Tennessee, where he received shock treatments and drugs."[2]

The district court denied the writ without an evidentiary hearing, agreeing with the findings of the magistrate. On this issue, the magistrate found, "Without specific allegations of the expected testimony of the [five identified individuals] and some indication that they would have been available to testify at trial, petitioner has failed to establish prejudice," JA 109, and noted that because "[p]etitioner does not furnish us any medical records connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime, [and] does not claim he was treated for or suffered from any mental condition since that earlier hospitalization . . . petitioner has not established prejudice." JA 113.

Mr. Sawyer raised three issues on appeal, i.e., ineffective assistance of counsel, that a violation of state law deprived him of equal protection and due process,[3] and a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), error. A divided panel affirmed the denial. *Sawyer v. Butler*, 848 F.2d 582 (5th Cir.

[2] Exhibit "S", Petition for Writ of Habeas Corpus, *State v. Blackburn*, No. 86-0223, Eastern District of Louisiana.

[3] The state law requires appointed counsel in capital cases to have been admitted to the bar for at least five years. La. Code Crim. Proc. Ann. Art. 512 (West 1984). Mr. Sawyer's trial counsel was admitted to the bar less than two years when the case went to trial. SH 138.

1988).[4] The court granted rehearing *en banc*,[5] and ruled against Mr. Sawyer. *Sawyer v. Butler*, 881 F.2d 1273 (5th Cir. 1989).

This Court granted certiorari and affirmed the Court of Appeal's decision. *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822 (1990).

Mr. Sawyer filed a second habeas corpus petition in the district court on October 8, 1990 and amended the petition on December 6, 1990 by adding a claim. All claims were fully exhausted. On July 16, 1991, the district court dismissed the petition, *Sawyer v. Whitley*, 772 F.Supp. 297 (E.D. La. 1991),[6] and declined to issue a certificate of probable cause. The Court of Appeals granted a certificate of probable cause to appeal, and affirmed the district court's denial. *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991). Thereafter, the court denied rehearing and rehearing *en banc*.

The second petition raised one claim which had been raised in the previous petition, i.e., that trial counsel's failure to investigate and present evidence of mitigation was ineffective assistance of counsel. The petition also raised two new claims: that the state withheld exculpatory evidence and that Mr. Sawyer was incompetent to stand trial.[7]

---

[4] Regarding the issue of ineffective assistance of counsel at the penalty phase, the court stated, "Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. . . . Sawyer neither describes the substance of [the] potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law." 848 F.2d at 587. (Mr. Sawyer's brother-in-law did not testify at the penalty phase).

[5] The *en banc* issue involved the application of *Caldwell v. Mississippi* in light of *Teague v. Lane*, 489 U.S. 288 (1989).

[6] The district court found that the relevant claims either constituted abuse of the writ or were successive claims.

[7] Mr. Sawyer alleged that the question of competency to proceed was unconstitutionally resolved due to the cursory and incomplete evaluations performed by the sanity commission members.

ii. Material Facts

At 7:00 a.m. on September 28, 1979, Robert Sawyer, Charles Lane and Cindy Shano returned home after a night of bar-hopping and drinking. Mr. Sawyer lived with Shano and her two sons. They had left the children with Frances Arwood, the victim and friend of Shano's, the night before, and had encountered Lane in one of the bars they visited that night. When they arrived home, all were drunk: "They were staggering. They couldn't get up the steps." R 1326.

Shano, the state's star witness, claimed that she left Mr. Sawyer during the evening and did not meet Lane until he arrived at her home with Mr. Sawyer the next morning where they continued drinking. TR 1174. She denied drinking alcohol. TR 1198. She stated that she left her home at about noon to use the telephone, and when she returned, Arwood's mouth was bleeding. TR 1145. At this point, Shano said that Lane and Mr. Sawyer began beating Arwood, and eventually, Arwood was set on fire.[8] TR 1151-52. Shano admitted not witnessing the burning but stated that Lane and Mr. Sawyer told her Mr. Sawyer set Arwood on fire. *Id.* The state also presented evidence of a lighter fluid can bearing Mr. Sawyer's fingerprints. TR 1310.[9]

Mr. Sawyer admitted to police that he beat Arwood after he became angry since it appeared that one of the children had been drugged. TR 1274-75.[10] One of the children told him that Arwood had given drugs to the other child. *Id.* Sawyer accused Lane of setting Arwood on fire, (TR 1276) and Lane,

---

[8] Arwood died nearly two months later as a result of burns and brain damage from head injury. TR 1080.

[9] The state offered Mr. Sawyer the opportunity to plead guilty to first degree murder and receive a life sentence. SH 15; 72.

[10] Two doctors were appointed by the court to examine Mr. Sawyer for competency to stand trial. They both reported that Mr. Sawyer told them he believed the child had been drugged by Arwood. JA 342, 345.

while admitting to raping Arwood, accused Sawyer of setting the fire. *See State v. Lane*, 414 So.2d 1223, 1225 (La. 1982).

Mr. Sawyer's defense was the inability to form specific intent due to intoxication. *See* La. Rev. Stat. Ann. 14:15 (West 1986). He presented the two doctors who were appointed to the sanity commission and lay witnesses in support of his defense. Each doctor testified based upon Mr. Sawyer's self-reported alcohol ingestion that he suffered from "toxic psychosis" and could not form the requisite intent at the time of the offense. JA 439, 475.

On cross-examination, Dr. Arneson testified that Mr. Sawyer is probably a sociopath. JA 472. She also gave testimony regarding the nature and characteristics of sociopathic persons: sociopaths have great problems conducting themselves according to the rules of society, have no guilt or remorse, will kill for their own benefit and "will do whatever they think they can get away with." JA 478-480.

Dr. DeVillier testified on cross-examination that it "would be more likely" that the crime was committed by a person with a sociopathic personality. JA 465. He also discussed the character of individuals with a sociopathic personality. JA 463-465.

The state argued that Mr. Sawyer was guilty of aggravated rape and aggravated arson.[11] Mr. Sawyer's counsel waived closing argument. TR 1451.

After waiving an opening statement at the penalty phase, defense counsel presented the testimony of Mr. Sawyer's sister, Glenda White, her son, Glenn White,[12] and Mr. Sawyer. White noted that her father was a strict disciplinarian who instilled the value of hard work in Mr. Sawyer, and stated that

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[11] Mr. Sawyer's conviction for first degree murder is based upon a finding of aggravated arson. Aggravated arson was also found as an aggravating circumstance by the jury at the sentencing phase. Aggravated rape was not found. *State v. Sawyer*, 422 So.2d at 99 n.8.

[12] Glenn White briefly testified that Mr. Sawyer took him to the park and movies, and played baseball with him. JA 520.

Mr. Sawyer could not engage in normal childhood recreational activities due to his work on the family farm. JA 507-508. She stated that she had left the household when Mr. Sawyer entered adolescence. JA 507. The jury learned that Mr. Sawyer had a propensity for running away from home and had been hospitalized.[13]

In the second habeas corpus petition, Mr. Sawyer presented evidence that is highly material to the appropriateness of the guilty verdict and death penalty. This evidence includes records of three mental health hospitalizations, school records, and reports of recent neurological and psychiatric evaluations.[14] These records and reports demonstrate that Mr. Sawyer's mental disabilities, mental retardation and frontal lobe damage limit the degree of his moral culpability and blameworthiness and establish that he is not a sociopath. In addition, Mr. Sawyer presented affidavits which cast grave doubt on his involvement in the aggravated arson.

Mr. Sawyer has an IQ of 68. JA 566. His mental retardation was first detected as a young child. After twice failing the first grade he was "socially promoted" and then placed in EMR (Educable Mentally Retarded) classes. R 231-233. He has the learning ability of a third or fourth grade student. JA 549.

As a teenager, he was diagnosed as both moderately and mildly mentally retarded, and as suffering from chronic brain syndrome with schizophrenic reaction. JA 537-540. Recent neurological, psychiatric and psychological evaluations corroborate the previous diagnoses; he suffers from Organic Personality Syndrome and mental retardation. JA 544-545, 548, 566. The experts believe that Mr. Sawyer has a "severely impaired ability" for reflective or abstract thinking, that his judgment is "grossly defective" and that his ability to control his impulses is "severely limited" due to prefrontal lobe brain

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[13] White stated, "because of his running away . . . they put Robert in the State Mental Hospital for no reason and they gave him drugs." JA 509.

[14] *See*, prior mental health records, JA 537-540, R 180-226; school records, R 228-34; and mental health evaluations, JA 541-568.

damage. JA 545, 547, 554. These evaluators concluded that Mr. Sawyer's organic impairment is probably attributable to repeated trauma to his central nervous system during his childhood years, including four documented occasions of unconsciousness due to head injuries and his mother's attempt to suffocate him when he was an infant. JA 544, 551-552.

Mr. Sawyer also presented evidence showing that the state withheld vital exculpatory evidence at trial. Shano's four year old son witnessed the burning of Arwood, and told a detective that Lane set fire to Arwood and that Mr. Sawyer attempted to prevent Lane from doing so. JA 587. Evidence was also presented showing that Shano was granted immunity in exchange for her testimony against Mr. Sawyer. JA 591-592, 596-597, 603. The facts proffered in the habeas corpus petition are more fully discussed in Argument III, *infra*.

SUMMARY OF ARGUMENT

While the Court has declined to delineate the precise contours of the "fundamental miscarriage of justice" exception to the cause-and-prejudice requirement as it applies to capital cases, *Smith v. Murray* and other precedents establish certain primary requirements that any definition of "death innocence" must respect. Most importantly, the underlying constitutional error must implicate the petitioner's actual, as opposed to legal innocence. This means that the error must preclude the development of true facts or result in the admission of false facts. Under *Smith*, a fundamental miscarriage of justice occurs when the error forecloses the presentation of mitigating evidence crucial to the petitioner's moral culpability.

Errors in the observance of constitutional exclusionary rules and other prophylactic safeguards that do not bear on the actual culpability of the individual petitioner do not generate miscarriages of justice. The miscarriage doctrine thereby isolates only the rare case since it is limited to fact-based errors so significant that, had they not occurred, the jury would probably have concluded that the balance of

aggravating and mitigating factors would not have warranted death.

The Fifth Circuit misconstrued *Smith* and fashioned its own radical and inequitable test, under which a petitioner is death-innocent only if he *could not*, but not if he *would not* have been sentenced to death absent the error. The Fifth Circuit's "eligibility" test rests on the incorrect premise that *Kuhlmann v. Wilson* and this Court's other non-capital miscarriage cases hold that a petitioner must establish that he would have been ineligible for a conviction absent the error.

The Fifth Circuit's test vastly exaggerates the relationship between a valid aggravating circumstance and the accuracy of a death sentence. As a construction of death-innocence, the concept of death-eligibility ignores the Eighth Amendment's core concern of individualized capital sentencing and discards the rule of *Locket v. Ohio* as irrelevant. A death-eligibility test will not protect true victims of miscarriages of justice.

Under the appropriate miscarriage standard, Robert Sawyer is innocent of the death penalty because he would not have been sentenced to death had the sentencer not been presented with a grossly inaccurate sentencing profile. Relying on the testimony of a court-appointed psychiatrist, Sawyer's own lawyer told the jury that he was probably a sociopath. This was a highly inaccurate and prejudicial diagnosis, as counsel would have discovered had he retrieved the psychiatric records from Sawyer's three commitments to mental institutions. Those records, presented for the first time in Sawyer's second habeas petition, document diagnoses of mental retardation, organic brain damage, schizophrenia, and a history which includes an abnormal EEG, electroconvulsive therapy and anti-psychotic medication. Although his client had been institutionalized because he had been adjudged incompetent, trial counsel presented false evidence that Sawyer had been hospitalized for no reason.

The State's suppression of favorable evidence concerning Sawyer's involvement in the aggravated arson further distorted the sentencing profile. Moreover, since this evidence

casts doubt on his guilt of first degree murder, Sawyer is entitled to relief even under the Fifth Circuit's test.

Robert Sawyer is the victim of a fundamental miscarriage of justice. He has a right to a hearing on the claims contained in his second habeas petition.

ARGUMENT

I. THE FUNDAMENTAL MISCARRIAGE OF JUSTICE DOCTRINE PERMITS CONSIDERATION OF A CLAIM CONTAINED IN A SUCCESSIVE HABEAS PETITION UPON A SHOWING THAT THE PRISONER WAS SENTENCED TO DEATH BECAUSE THE SENTENCER CONSIDERED FALSE EVIDENCE OR BECAUSE THE SENTENCER WAS DEPRIVED OF CONSIDERING TRUE EVIDENCE CRITICAL TO THE PRISONER'S CULPABILITY.

The fundamental miscarriage of justice doctrine is a narrow exception to the rule that, absent a showing of cause-and-prejudice, a petitioner is not entitled to consideration of claims presented in a second habeas corpus petition.

While the Court has declined to delineate the precise contours of the fundamental miscarriage of justice standard as it applies to capital cases, the Court's precedents establish certain primary considerations that any acceptable standard must embrace. These include: (1) that the sentencer was seriously misled because it either (a) considered false aggravating facts or (b) was deprived of considering true mitigating facts, and (2) that there is a probability that, absent the error, the sentencer would have concluded that a death sentence was not appropriate.

A. The Fundamental Miscarriage Of Justice Doctrine Mandates Consideration Of Successive, Abusive Or Defaulted Claims Supplemented With A Showing Of Factual Innocence.

The contours of the miscarriage of justice standard began to emerge in a series of decisions beginning with *Kuhlmann v.*

Wilson, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 477 U.S. 527 (1986). These decisions began the Court's effort to define the extraordinary circumstances under which prisoners filing habeas corpus petitions[15] presenting successive, abusive or defaulted claims are entitled to a merits ruling despite their inability to show cause-and-prejudice for the default or writ abuse.[16]

In *Kuhlmann v. Wilson*, the prisoner filed a second habeas corpus petition presenting a claim previously considered and decided on the merits. A plurality of the Court announced that, "[i]n light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction," federal courts are required "to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[17] 477 U.S. at 454.

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[15] 28 U.S.C. Section 2254.

[16] "The terms 'successive petition' and 'abuse of the writ' have distinct meanings." *Kuhlmann*, 477 U.S. at 445, n.6. *See Sanders v. United States*, 373 U.S. 1, 15-17 (1986). "Successive petitions" raise grounds identical to those previously raised and decided on the merits. *Kuhlmann*. Petitions which allege new grounds, not previously raised, constitute an "abuse of the writ." *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454 (1991); *See* Rule 9(b) of the Rules Governing Section 2254 Cases. A procedurally defaulted claim is one which was not properly raised in the state forum. *Carrier*. Despite their distinct meanings, the Court has decided "that the same standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse of the writ context." *McCleskey*, 111 S.Ct. at 1454. "The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse of the writ inquiry. . . . " *Id.* at 1470. However, "[i]f a petitioner cannot show cause, the failure . . . may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* at 1470.

[17] The Court's standard was drawn from an article written by Judge Friendly, who proposed that Congress reform habeas corpus practice by

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The Court in *Kuhlmann* drew a clear distinction between factual innocence and legal innocence, specifically stating that the reviewing court must assess the claim "in light of all the evidence" available to it. *Id.* at 454 n.17 (quoting Friendly, *supra*, at 160). Kuhlmann's underlying constitutional claim alleged a violation of the Court's holding in *Massiah v. United States*, 377 U.S. 201 (1964). The Court noted that "[t]he constitutional claim argued by [the prisoner] does not raise any question as to his guilt or innocence," because a *Massiah* violation is a *legal* error which does not result in the admission of false facts or the absence of true facts. 477 U.S. at 455. Since Kuhlmann failed to supplement his underlying constitutional claim with a showing of factual (as opposed to legal) innocence, the plurality found that the Court of Appeals should have dismissed the petition. *Id.*

In *Murray v. Carrier*, the Court extended the availability of its narrow innocence exception to prisoners whose petitions include defaulted claims and who are unable to demonstrate cause-and-prejudice. The Court provided that a petitioner would be entitled to habeas relief even absent a showing of cause for the procedural default "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* Carrier's petition for review of his defaulted discovery claim was remanded for dismissal "unless it is determined on remand that the victim's statements contain material that would establish [Carrier's] actual innocence." 477 U.S. at 497.

In a more recent case, *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1451 (1991), the Court re-emphasized the critical importance of the distinction between actual and legal innocence. Although his *Massiah* claim had not been presented in

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requiring a showing of factual innocence as a prerequisite for habeas review generally. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970); *Kuhlmann*, 477 U.S. at 455.

his first habeas petition, McCleskey argued that he was nonetheless entitled to a merits ruling to prevent a miscarriage of justice. The Court noted that the miscarriage of justice doctrine "require[s] federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.' " 111 S.Ct. at 1471, quoting *Kuhlmann*, 477 U.S. at 455.

McCleskey, though, was not entitled to protection of the miscarriage of justice exception because, like Kuhlmann, he was unable to demonstrate that the underlying error resulted in the admission of false incriminating evidence. "The *Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence. . . . McCleskey cannot demonstrate that the alleged *Massiah* violation caused the conviction of an innocent person." *Id.* at 1475.

McCleskey, then, reaffirmed precedent of this Court, holding squarely that, when the conviction is under attack, the miscarriage of justice exception is unavailable unless the petitioner's constitutional claim implicates his actual, not legal, innocence.

B. The Fundamental Miscarriage Of Justice Doctrine Mandates Consideration Of Successive Capital Sentencing Claims Supplemented With A Showing That The Sentencer Considered False Evidence Or Was Deprived Of Considering True Evidence Crucial To Culpability.

The Court first considered the application of the fundamental miscarriage of justice exception to the penalty phase of a capital murder proceeding in *Smith v. Murray*. In *Smith*, the petitioner contended that the introduction at the penalty phase of his truthful statements to a court-appointed psychiatrist violated his Fifth Amendment rights because he did not receive his *Miranda* warnings.[18]

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[18] During the course of the psychiatric examination, Smith reported that "he had once torn the clothes off a girl on a school bus before

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Acknowledging that the concept of "actual," as distinct from "legal," innocence "does not translate easily into the context of an alleged error at the sentencing phase of a capital offense," *Smith*, 477 U.S. at 537, the Court enforced the procedural default for two reasons. First, there was "no allegation that the testimony was false or in any way misleading." *Id.* at 538. Second, there was no support for an allegation that the psychiatrist's role in the prosecution "had the effect of foreclosing meaningful exploration of psychiatric defenses." *Id.* The Court concluded that, "[i]n short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Id.* The Court rested its holding on the undisputed fact that the admission of the constitutionally-tainted, yet truthful, testimony "did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society."[19] *Id.* (emphasis in original).

Read together, *Kuhlmann*, *Carrier*, *McCleskey* and *Smith* restrict the availability of the miscarriage of justice doctrine to the rare capital case where a constitutional error has resulted in the admission of false evidence or where the error has deprived the jury of true exculpating or mitigating evidence.

In a subsequent case applying the miscarriage of justice doctrine to a capital sentencing proceeding, the Court continued to focus on whether the alleged constitutional error resulted in the admission of false facts or precluded the

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deciding not to rape her." 477 U.S. at 531. The court-appointed psychiatrist failed to inform Smith that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired. *Id.*

[19] Smith's "jury had relied on two distinct aggravating factors in its decision to recommend the death penalty." *Smith*, 477 U.S. at 533 (addressing opinion of court of appeals). The psychiatric testimony addressed "the likelihood that petitioner would 'constitute a continuing serious threat to society.' " *Id.* (citations to Virginia statute omitted). Smith did not challenge the other statutory aggravating factor. *Id.*

admission of true mitigating facts. *Dugger v. Adams*, 489 U.S. 401 (1989), concerned a defaulted *Caldwell* claim.[20] The Court rejected the petitioner's argument that the very nature of the instructional error established that the sentencing determination was inaccurate. "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." 489 U.S. at 410 n.6. Thus, defects in the procedures designed to ensure the integrity of a death sentence do not amount to a miscarriage of justice in the absence of a factual showing that the individual petitioner's sentence is unwarranted when the defects are corrected.

In short, the petitioner must show that he was sentenced to death because the sentencer considered false evidence, or because the sentencer was deprived of considering mitigating evidence crucial to the petitioner's culpability.[21]

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[20] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

[21] Perhaps the best workable synthesis of the principles which emerge from the Court's precedents is Judge Anderson's formulation: "The miscarriage of justice concept permits consideration of a defaulted claim, even in the absence of a showing of 'cause,' where the alleged constitutional error has resulted in a *factually inaccurate sentencing profile*. . . . " *Johnson v. Singletary*, 938 F.2d 1166, 1200 (11th Cir. 1991) (*in banc*) (Anderson, J., dissenting) (emphasis added). "[T]he standard I propose reflects the common sense meaning of the language used by the several applicable Supreme Court decisions." *Id.* Indeed, this Court has used identical language in evaluating a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 688, 699-701 (1984) ("The evidence that respondent says his trial counsel should have offered at the sentencing hearing *would barely have altered the sentencing profile* presented to the sentencing judge") (emphasis added).

C. The Fundamental Miscarriage Of Justice Doctrine Will Not Allow For Consideration Of Successive Claims Unless There is a Probability That, Absent The Fact-Based Error, The Jury Would Have Concluded That A Death Sentence Was Not Warranted.

A repeat capital habeas petitioner is not entitled to merits review of his claim merely because the claim resulted in the presentation of false facts or the absence of true mitigating facts. The petitioner must also demonstrate that the factual inaccuracy impacted on the sentencing determination. Thus, a constitutional error which results in either the introduction of inconsequential false evidence, or the absence of inconsequential mitigating evidence, will not produce a fundamental miscarriage of justice.

In *Kuhlmann v. Wilson*, a plurality of the Court determined that the "ends of justice"[22] require federal courts to entertain claims advanced in successive habeas petitions only where the prisoner supplements his claim with a "colorable showing" of factual innocence. 447 U.S. at 454. Drawing from Judge Friendly's proposal, *Kuhlmann* provided that a prisoner could make the requisite showing only by demonstrating "a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt about his guilt." 477 U.S. at 454 n.17 (quoting Friendly, *supra*, at 160). Thus, to remain faithful to *Kuhlmann*, any death-innocence claim would be scrutinized under the "fair probability" standard.

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[22] Drawing on language contained in the habeas statute then in effect, *Sanders v. United States*, 373 U.S. 1, 15-17 (1963) held that a federal court must decide if the "ends of justice" require consideration of a successive petition. *See* 28 U.S.C. Sec. 2254 (1964 ed.). *Kuhlmann* held that this inquiry remained appropriate even though the operative language was deleted from the 1966 revision to the habeas enactment. 477 U.S. at 451. After recognizing that the fundamental miscarriage of justice exception "gives meaningful content to the otherwise unexplained 'ends of justice' inquiry" mandated by *Sanders*, the Court in *McCleskey* embraced the *Kuhlmann* plurality's "factual innocence" inquiry as the central source of this content. 111 S.Ct. at 1471.

As *Kuhlmann* involved a challenge to a conviction, the Court announced a test appropriate to that context – whether the jury would have entertained a reasonable doubt about guilt. In the context of a capital sentencing proceeding, however, this analysis has limited utility. The appropriate standard would assess whether, absent the error, there is a fair probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.[23] This standard remains faithful to *Kuhlmann* where possible (fair probability) but incorporates *Strickland*'s more appropriate penalty phase inquiry into the balance of aggravating circumstances.

D. The Fundamental Miscarriage Of Justice Exception Is Limited To The Rare And Exceptional Capital Case.

The fundamental miscarriage of justice exception is limited to the rare and exceptional capital case by several restrictions. First, mere legal errors do not produce miscarriages of justice. This is true even in close cases. *Dugger v. Adams*, 489 U.S. at 410 n.6 (instructional error insufficient to excuse default even though sentencer found equal number of aggravating and mitigating circumstances). Thus, constitutionally deficient jury instructions, improper penalty phase prosecution argument, issues relating to jury bias, and other common genres of capital trial error simply do not generate miscarriages of justice.

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[23] The Court recognized as much in *Strickland v. Washington*, when it formulated two distinct tests for assessing the effect of deficient legal representation at the liability and penalty phase. The guilt phase test, which closely parallels the *Kuhlmann/McCleskey* standard set forth above, focuses on whether the jury would have entertained a reasonable doubt about guilt absent counsel's errors. The penalty phase inquiry is tailored to the penalty phase context. It focuses on whether, absent the error, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 696.

Second, errors in the observance of constitutional exclusionary rules and other prophylactic safeguards that do not bear on the actual culpability of the individual petitioner do not generate miscarriages of justice. *McCleskey v. Zant*, *supra*; *Smith v. Murray*, *supra*. Rather, the constitutional error must have either produced false evidence or precluded the development of true evidence.[24]

Claims of ineffective assistance of counsel, consequently, would not produce miscarriages of justice if the incompetence complained of did not result in the presentation of false evidence or the failure to present true mitigating evidence. In short, only a very small subset of *Strickland* Sixth Amendment errors will constitute a fundamental miscarriage of justice.[25]

Further, the fundamental miscarriage of justice exception is not satisfied unless there is a "fair probability" that the admission of false evidence, or the preclusion of true mitigating evidence, resulted in a sentence of death.[26] *Kuhlmann*, 477 U.S. 454 n.17 (quoting Friendly, *supra*, at 160). This requirement "would enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention. . . . " Friendly, *supra*, at 150.

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[24] The "innocence of death" concept does not create a new species of federal constitutional error. Rather, it serves as an important screen to isolate the rare successive, abusive or defaulted claim which adequately demonstrates that the sentencer considered false evidence or was precluded from considering true mitigating evidence crucial to culpability.

[25] Of course, proving that ineffective assistance of counsel resulted in the admission of material false evidence or in the preclusion of crucial mitigating evidence would only entitle the petitioner to a ruling on the Sixth Amendment claim.

[26] As indicated *supra*, the Court in *McCleskey* reaffirmed the *Kuhlmann* "colorable showing of factual innocence" standard. 111 S.Ct. at 1471. However, Sawyer prevails not only under this standard, but also under either the more restrictive "more likely than not" standard suggested by the *Johnson* dissent 938 F.2d at 1200, or the "more probable than not" standard adopted by the Ninth Circuit. *Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir. 1991). *See Argument III*, *infra*.

Finally, a reviewing court need not wrestle with the question of whether the underlying error in fact produced false evidence or foreclosed the development of mitigating evidence "[i]f it is easier to dispose of [such a] claim on the ground of a lack of sufficient prejudice. . . . " *Strickland v. Washington*, 466 U.S. at 697.

In sum, a fundamental miscarriage of justice will only arise in an exceptional case under the Court's precedents, since (1) generic errors in constitutional rules of procedure, no matter how inherently prejudicial, do not create miscarriages of justice; (2) constitutionally inadmissible but truthful evidence does not create a miscarriage of justice; (3) only errors which result in (a) the consideration of false evidence or (b) the preclusion of true mitigating evidence create miscarriages of justice; and (4) even then, a miscarriage of justice results only if there is a probability that the jury would not have imposed death.

II. THE FIFTH CIRCUIT'S RIGID "ELIGIBILITY" TEST IS CONTRARY TO THIS COURT'S PRECEDENTS AND UNFAITHFUL TO THE EIGHTH AMENDMENT'S CORE CONCERN OF INDIVIDUALIZED SENTENCING.

Instead of resolving Sawyer's miscarriage of justice claim pursuant to the standards developed by this Court (see Argument I, *supra*), the Fifth Circuit fashioned its own radical and inequitable "eligibility"[27] standard in dismissing the

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[27] The Fifth Circuit does not use the term "eligibility" when describing its miscarriage of justice test, referring instead to the "authority" to entertain a death sentence. 945 F.2d at 820. However, the Fifth Circuit's test is virtually identical to the standard of the majority opinion in *Johnson v. Singletary*, 938 F.2d 1166 (11th Cir. 1991) (*in banc*). Because the Fifth Circuit relies heavily on *Johnson*, because in *Johnson* the Eleventh Circuit itself notes that its standard "is tied to eligibility," 938 F.2d at 1183, and because the term accurately describes both tests, the Fifth Circuit's standard will be referred to *infra* as an "eligibility" test. It should be noted, though, that the Eleventh Circuit test gauges eligibility

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petition. The Fifth Circuit's standard is seriously flawed. First, it is unfaithful to this Court's precedents. Second, it completely misconstrues the relationship between the existence of a valid aggravating circumstance and the appropriateness of a death sentence. Finally, the standard offends both the Eighth Amendment's core concern of individualized sentencing and the equitable principles that animate the Writ of Habeas Corpus.

A. The Fifth Circuit's Test Is Unfaithful To Supreme Court Precedents.

The Fifth Circuit's standard is as follows:

> Translating *Kuhlmann*'s guilt-innocence phase test to the sentencing phase, then, we must require a petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty. . . .
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> * * *
>
> That is, a petitioner is not actually innocent of the death penalty unless he demonstrates, under all the evidence that was and arguably should have been presented, that the jury would not have been authorized to sentence him to death.

Sawyer, 945 F.2d at 820 (footnotes omitted).

The Fifth Circuit's "eligibility" test is predicated on a misreading of this Court's most extensive treatment of the miscarriage of justice exception in a capital case. *Smith v. Murray*, 477 U.S. 527 (1986). In attempting to rationalize its radical standard, the Fifth Circuit contended that: "[i]n dismissing Smith's claim, the Court *seems to have implied* that a

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without regard to state law prerequisites for imposing the death penalty while the Fifth Circuit test looks to state law requirements as well. *Sawyer*, 945 F.2d at 820 n.13.

claim that challenged only one aggravating circumstance was 'unrelated to [actual] innocence,' and thus failed to present the risk of a fundamental miscarriage of justice." 945 F.2d at 818 (citations omitted) (emphasis added). It is true that the petitioner in *Smith* challenged only one of two statutory aggravating circumstances. However, this Court's analysis of Smith's miscarriage of justice contention demonstrates that the failure to challenge all aggravating factors was in no manner dispositive of the claim.[28]

The fact is that, in *Smith*, the Court stated in no uncertain terms that a miscarriage of justice results when the accuracy of the sentencing determination is undermined by an error which precludes the development of mitigating evidence. In rejecting Smith's miscarriage of justice contention, the Court specifically found that the error did not have "the effect of foreclosing meaningful exploration of psychiatric defenses." *Smith*, 477 U.S. at 538. This observation can only mean that an error which does in fact foreclose the development of crucial mitigating psychiatric testimony constitutes a miscarriage of justice.

By observing that, "[i]n short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones[,]" the Court clearly rejected any standard that ignores mitigating evidence. *Smith*, 477 U.S. at 538. The Court's observation about "true facts" makes no sense unless it refers to true *mitigating* facts; only this interpretation of *Smith* is faithful to the decision's

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[28] As Chief Judge Tjoflat observed:

> 'Had the Supreme Court intended to adopt an eligibility test, it would merely have noted the existence of the untainted aggravating circumstance, concluded that the defendant was still eligible for the death penalty, and thus found that the miscarriage of justice standard was not satisfied' . . . I agree with Judge Anderson that *Smith*, as well as *Adams*, undermines the court's eligibility test. . . .

Johnson v. Singletary, 938 F.2d at 1193 n.15 (Tjoflat, C.J., concurring and dissenting) (quoting Anderson, J., dissenting at 1199).

unvarying emphasis on the impact of inaccurate evidence[29] on the jury's deliberations[30] and verdict.[31] "In other words, in *Smith*, the Supreme Court focused on the accuracy of the sentencing determination." *Johnson*, 938 F.2d at 1196 (Anderson, J., dissenting).

The Fifth Circuit misconstrued not only *Smith*, but also *Dugger v. Adams*, 489 U.S. 401 (1989), and *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454 (1991), both of which reiterate that a repeat habeas petitioner must augment his or her constitutional claim with a challenge to the accuracy of the evidence, and not simply the reliability of the verdict. Discussing both cases, the Fifth Circuit states:

> In cases following *Smith*, the Supreme Court has continued to adhere to the view that actual innocence requires more than showing a constitutional error, *even one that results in the admission of false or misleading facts*, and even if the verdict or sentence would have been different absent the error.

945 F.2d at 818 (emphasis added). *Adams* and *McCleskey do* hold that actual innocence requires more than a showing of constitutional error, even if the verdict or sentence would have been different absent the error. But the Fifth Circuit's suggestion that these cases dealt with false or misleading facts is simply in error. Neither petitioner pressed claims which involved the admission of false or misleading facts,[32]

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[29] Testimony not "false or in any way misleading." 477 U.S. at 538.

[30] Error "did not serve to pervert the jury's deliberations. . . . " 477 U.S. at 538.

[31] There is nothing unfair about enforcing default rules "in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." 477 U.S. at 538.

[32] The Fifth Circuit's observation that *Adams* clarifies "that the Court did not intend *Smith* to stand for the converse proposition – that the admission of false facts or the omission of true facts would end the inquiry into whether a petitioner was innocent of the death penalty[,]" 945 F.2d at 821 n.16, is simply untrue, for Adam's claim did not implicate the accuracy of the evidence before the jury. Moreover, Sawyer

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and, indeed, both decisions emphasized that the admission of false or misleading evidence *can* demonstrate "actual innocence" of the death penalty. *See supra*.

B. The Fifth Circuit's Eligibility Test Rests On A Misreading Of *Kuhlmann* And A Misunderstanding Of The Origin And Nature Of The Actual Innocence Exception To Successive And Abusive Petitions.

1. *Jackson v. Virginia* Has No Bearing On The Determination Of Whether A Petitioner Has Supplemented His Constitutional Claim With A Colorable Showing Of Actual Innocence.

According to the Fifth Circuit, *Jackson v. Virginia*, 433 U.S. 307 (1979), is the foundation of this Court's actual innocence doctrine as an exception to writ abuse: "*Jackson v. Virginia*, which provided the foundation for the *Kuhlmann* test, carefully limited the role of courts in conducting a sufficiency of the evidence review." 945 F.2d at 821. *See also id.* at 817 ("The *Kuhlmann* plurality drew from . . . *Jackson v. Virginia*. . . . ").

In fact, the *Kuhlmann* plurality opinion itself does not contain a *single* citation to *Jackson v. Virginia*. *Kuhlmann* neither "drew from" *Jackson*, nor used it as the "foundation" for developing its factual innocence test. This Court's opinion in *Jackson* has nothing to do with an assessment of whether a repeat habeas petitioner has supplemented his claim of constitutional error with a colorable showing of actual innocence. The Fifth Circuit's incorporation of the *Jackson* sufficiency of the evidence test into its standard for reviewing claims of

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does not contend that such a showing would *end* the inquiry into the question of death-innocence. A petitioner would never be entitled to a merits ruling on a claim that was not supplemented with a strong showing that the error precluded the development of *crucial* mitigating evidence or resulted in the admission of *material* false evidence.

"actual innocence of death" betrays a serious misunderstanding of the purpose, nature, and consequences of an inquiry into a repeat habeas petitioner's factual innocence.

Jackson v. Virginia holds that the Due Process Clause "prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." 443 U.S at 309 (citing *In re Winship*, 397 U.S. 358 (1970)). *Jackson* fashioned a standard for reviewing insufficiency claims which "impinges on jury discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. A reviewing court does not make its own subjective determination of guilt or innocence since to do so would constitute a forbidden incursion into jury discretion.

The miscarriage of justice doctrine serves a completely different purpose. The integrity of the evidence is analyzed not to determine whether the jury based a conviction on an insufficient foundation, but to isolate those rare cases where a fundamental miscarriage of justice results from the jury's receipt of a distorted picture of the defendant's culpability. The victim of a fundamental miscarriage of justice is not asking the court to review the rationality of a jury's interpretation of the evidence properly before it, but is asserting that, because of a constitutional violation, the evidentiary record presented to the jury fundamentally misrepresented the facts bearing on his guilt or sentence.

This distinction is reflected in the different inquiries that the Court has prescribed in *Jackson* and the miscarriage of justice cases. *Jackson* is a record-bound inquiry.[33] On the other hand, the *Kuhlmann* inquiry contemplates review of evidence the jury did not, but should have, heard.[34] Drawing

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[33] "[T]he critical inquiry . . . must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. at 318.

[34] The Fifth Circuit's abstract suggestion that such an inquiry would insult the integrity of the jury's deliberative process is untrue for two reasons. First, the inquiry into the issue of actual innocence, if established, would only result in a ruling on the underlying claim. Second,

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from a standard originally proposed by Judge Friendly,[35] the *Kuhlmann* plurality concluded that a proper inquiry into the question of actual innocence embraces "evidence tenably claimed to have been wrongly excluded or to have become available only after the trial. . . . " 477 U.S. at 454 n.17.

Another crucial distinction between an assessment of the sufficiency of the evidence under *Jackson* and an assessment of actual innocence under *Kuhlmann* concerns the standard of review employed with each analysis. *Jackson* asks whether any rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. The *Kuhlmann* inquiry focuses on whether there is a probability that, absent the error, the jury "would have entertained a reasonable doubt about guilt." 477 U.S. at 454 n.17.

The *Jackson* sufficiency test is itself an eligibility test, asking whether the defendant was entitled, as a matter of law, to a directed verdict of not guilty. *Kuhlmann*, of course, sets forth no such standard. The issue in *Kuhlmann* is, where significant new evidence is placed in the record, whether the fact finder would have entertained a reasonable doubt about

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because claims of actual innocence involve only constitutional errors which result in the presentation of false facts or the preclusion of true facts, the integrity of the deliberative process would be promoted by evaluating what the jury would have done had it been aware of the inaccurate evidence. In this case, for instance, Juror Cacioppo indicated during voir dire that he would look favorably on an intoxication defense only in one situation: "I think for somebody to do that they would have to have a very low IQ." TR 704, 712. Due to a serious violation of Sawyer's right to effective assistance of counsel, Juror Cacioppo heard no evidence that Sawyer is mentally retarded. Under these circumstances, an inquiry into the impact such evidence would have had on the jurors' deliberations would promote the integrity of the deliberative process.

[35] Friendly, *Is Innocence Irrelevant: Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970).

guilt, *not* whether the petitioner would have been entitled to a directed verdict.[36] 477 U.S. at 455 n.17.

The Courts of Appeals applying the "actual innocence" exception have looked not to whether the error would have rendered the petitioner ineligible for an adjudication of guilt, but whether the new evidence would have made a difference in the verdict. *See, e.g., Henderson v. Delo*, 926 F.2d 706, 713 (8th Cir. 1991) ("The actual innocence exception applies in this case if a jury considering the evidence presented to the district court probably would not convict Henderson of capital murder"); *Jacks v. Duckworth*, 857 F.2d 394, 400 (7th Cir. 1990) ("While the exact contours of the 'colorable showing of factual innocence' standard have yet to be precisely defined, it appears that Jacks has made such a showing in this case . . . both his claims of constitutional error go to issues directly related to the jurors' consideration of his insanity defense").[37]

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[36] The Fifth Circuit's confusion concerning the *Jackson* and *Kuhlmann* standards may have arisen from its reliance on the majority opinion in *Johnson v. Singletary*. The *Johnson* Court, over two strong dissents, held that "a defendant is innocent of a crime *only if he is ineligible for an adjudication of guilt* . . . " 945 F.2d at 1182 (emphasis added). "A properly convicted defendant's claim to innocence in the sentencing context is *likewise tied to eligibility*." *Id.* at 1183 (emphasis added). *See also id.* at 1184.

[37] The Fifth Circuit's view is also contrary to Judge Friendly's proposal, the real "foundation" for the *Kuhlmann* test. The architect of the "actual innocence" requirement simply did not contemplate a test that assesses only whether a petitioner is eligible for an adjudication of guilt. Rather, Judge Friendly promoted a requirement that the factual error raise serious concerns about the petitioner's guilt. "In collateral attacks . . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some *shadow of a doubt on his guilt*." Friendly, *supra*, at 142, quoting *Kauffman v. United States*, 394 U.S. 217, 235-236 (Black, J., dissenting). *See also, United States v. Miller*, 411 F.2d 825 (2d Cir. 1969), "[f]or an example that would have met this criterion if it had arisen by way of collateral attack. . . . " Friendly, *supra*, at 142. *Miller* illustrates that Judge Friendly did not contemplate the sort of eligibility test promoted by the Fifth Circuit. Miller's conviction was

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In sum, both the Fifth and Eleventh Circuit's conception of death-eligibility as a formulation of death-innocence is a result of a fundamental misreading of *Kuhlmann* and a misunderstanding of the nature and purpose of the Court's miscarriage of justice doctrine.

C. The Fifth Circuit's Eligibility Test Bespeaks A Misunderstanding Of The Court's Precedents Defining The Nature And Structure Of Penalty Phase Proceedings.

1. *Bullington v. Missouri* Does Not Provide Authority For The Fifth Circuit's Test.

The Fifth Circuit suggested that this Court's opinion in *Bullington v. Missouri*, 451 U.S. 430 (1981), informed the Court's resolution of the miscarriage of justice claim in *Smith v. Murray*:

> We think that this Court's willingness in *Smith* to consider Smith's claim that he was actually innocent of his death sentence is premised on the distinction that the court drew in *Bullington* between a death sentence and other sentences, and that distinction informs our view as to the content of the standard we set forth today.
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> * * *

See Bullington, 451 U.S. at 439, 101 S.Ct. at 1858 (distinguishing a death sentence proceeding from

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reversed on direct appeal due to "the Government's failure to disclose to the defense the pre-trial hypnosis of its principle witness, in part by the attorney who examined him at trial." 411 F.2d at 827. Independent, unchallenged circumstantial and direct evidence corroborated the testimony of the hypnotized witness. Nevertheless, Judge Friendly viewed the new evidence as sufficient to establish a colorable showing of actual innocence. *Miller* indicates that Judge Friendly was concerned with the credibility of the prosecution's case, not whether the new evidence cast doubt on the defendant's eligibility for an adjudication of guilt. Without a doubt, the hypnosis evidence would not have entitled Miller to a directed verdict of acquittal.

> other sentencing procedures in which there is "no separate sentencing proceeding at which the prosecution [is] required to prove – beyond a reasonable doubt – additional facts in order to justify the particular sentence.")

945 F.2d at 819-820.[38]

Indeed, in *Bullington*, this Court did distinguish between capital and non-capital sentences, but not in the mechanistic manner suggested by the Fifth Circuit. Rather, this Court's opinion in *Bullington* demonstrates that the central issue in a capital sentencing proceeding is not simply whether the prosecution can prove the existence of a statutory aggravating factor, but whether it can prove that death is an appropriate punishment.

Bullington held that the Double Jeopardy Clause does not tolerate imposition of the death penalty following a second capital trial where the first trial resulted in a life sentence. The Court recognized that double jeopardy ordinarily has no vitality in a resentencing context, since sentencing proceedings are typically free of substantive control or guidance. However, the Court found that the Missouri capital sentencing procedures[39] so resembled a trial on the issue of guilt or innocence that the jury was required to determine whether the prosecution "proved its case."[40] 444 U.S. at 451.

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[38] *Bullington* is not cited in the Court's opinion in *Smith v. Murray*.

[39] "The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice." 451 U.S. at 438. This observation applies to Louisiana's capital sentencing scheme as well. La. Code Crim. Proc. Ann. Art. 905.2 (West 1984).

[40] The Court's decision in *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984), reviews the elements of a capital proceeding which liken it to a trial:

> The discretion of the sentencer . . . is restricted to precisely two options: death, and life imprisonment. . . . In addition, *the*

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In *Poland v. Arizona*, 476 U.S. 147, 153 n.3 (1986), this Court specifically held that a prosecutor's burden at a capital sentencing proceeding is to prove that the defendant deserves the death penalty: "The 'case' to which the Court referred in *Bullington* was the prosecution's case that *the defendant deserved the death penalty*."[41]

The appropriateness of the sentence, then, and not proof of an aggravating factor, is the central consideration in a capital sentencing proceeding. "*Bullington* indicates that the proper inquiry [regarding 'acquittal'] is whether the sentencer or reviewing court has 'decided that the prosecution *has not proved its case' that the death penalty is appropriate*." *Id.* at 155 (emphasis added). *See also, id.* at 156 (sentencer's finding of any particular aggravating circumstance "does not of itself 'convict' a defendant (i.e., require the death penalty)"); *Rumsey*, 467 U.S. at 211 (sentence of life imprisonment "undoubtedly an acquittal on the merits of *the central issue in the proceeding – whether death was the appropriate punishment* for the respondent's offense") (emphasis added).

The Court's decisions in *Bullington*, *Poland*, and *Rumsey* reveal that capital sentencing proceedings are distinguished

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> *sentencer is to make its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembles a trial.* Finally, the prosecution has to prove certain statutorily defined facts beyond a reasonable doubt in order to support a sentence of death. . . . *for these reasons*, when the Missouri sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case.

(emphasis added).

[41] "The analogy drawn was between a death sentence and a verdict of guilty, a life sentence and a verdict of innocent." The Court emphasized that the sentencer was required to make a choice between "two alternative verdicts . . . a statement inconsistent with the view that for double jeopardy purposes the capital sentencer should be seen as rendering a series of mini-verdicts on each aggravating circumstance." *Id.*

from non-capital sentencing proceedings not simply because the prosecution must prove an aggravating factor, but because the prosecution must prove that death is the appropriate punishment during a proceeding structurally similar to a guilt-innocence trial. Proof of an aggravating factor is but an initial step[42] toward the determination of "the central issue in the proceeding – whether death [is] the appropriate punishment. . . . " *Rumsey*, 476 U.S. at 211. The Fifth Circuit's eligibility test fails to comport with this Court's precedents because it does not even purport to assess the impact which the underlying constitutional error had on the central issue – whether death is the appropriate sentence.

2. The Fifth Circuit's Eligibility Test Fails To Recognize That This Court Has Developed Objective Standards To Evaluate The Impact Of Penalty Phase Error.

The Fifth Circuit complained that "if we were to entertain a claim based on mitigation evidence, we would be compelled to scrutinize the jury's deliberative process. . . . " 945 F.2d at 823 n.18. Further, the Fifth Circuit suggested that jury discretion is foreign to any proceeding except the penalty phase of a capital murder case, implying that such scrutiny would be difficult, if not impossible.

The Fifth Circuit's concerns are plainly unfounded. There is simply no difficulty assessing the impact of penalty phase errors in various contexts.[43] Furthermore, in another context, this Court *has* developed objective standards for assessing the

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[42] This is clearly the case under Louisiana's capital sentencing scheme. "[T]he finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." *Sawyer v. State*, 442 So.2d 1136, 1139 (La. 1983).

[43] *See e.g., Satterwhite v. Texas*, 486 U.S. 249 (1988) (impact of erroneous admission of aggravating psychiatric testimony evaluated under harmless error test); *Johnson v. Mississippi*, 486 U.S. 578, 586 (1988) (erroneous admission of invalid conviction required re-examination of death sentence since its admission was possibly "decisive").

impact of penalty phase error which focuses on the consideration of aggravating and mitigating circumstances. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("the question is whether . . . absent the errors, *the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death*") (emphasis added).[44] Finally, "[a]lthough it is true that the [issue of whether mitigating circumstances outweigh aggravating circumstances] is dependent on discretion, this is certainly also true of other substantive offenses as well. For example, the difference between voluntary manslaughter and murder often turns on the fact finder's discretion with respect to whether sufficient provocation exists." *Johnson v. Singletary, supra*, 938 F.2d at 1198 (Anderson, J., dissenting).

D. The Fifth Circuit's Eligibility Test Ignores The Eighth Amendment's Core Concern Of Individualized Consideration.

The Fifth Circuit's test is suitable only to a scheme which mandates the death penalty upon a conviction for a capital offense, for the concept of eligibility implies that any member of a legislatively defined death-eligible class is necessarily deserving of death. However, the Court has invalidated mandatory statutes as violative of the Eighth Amendment since they "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." *Sumner v. Shuman*, 483 U.S. 66, 74-75 (1987) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). *See, Roberts (Harry) v. Louisiana*, 483

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[44] The lower courts have encountered no difficulty in applying the *Strickland v. Washington* test in assessing the impact of ineffective penalty phase representation. *E.g, Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988) (failure to document psychiatric hospitalization was deficient and prejudicial); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986) ("Brogdon makes no showing that he was prejudiced in any way by the failure to present this cumulative testimony").

U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality recognized that the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a sentence less than death." *Id.* at 604 (emphasis in original). "As the Chief Justice explained, the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

Eligibility not only ignores, but insults, the rule of *Lockett*.[45] Eligibility validates the Eighth Amendment's threshold narrowing requirement, but not its central requirement of individualized consideration. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879-880 (1983) (emphasis in original).

The concept of death-eligibility vastly exaggerates the relationship between a valid aggravating circumstance and the accuracy of a death sentence, as this case vividly illustrates. Robert Sawyer entered his penalty phase *after* the narrowing function had been performed, for under Louisiana law this process occurs at the guilt stage.[46] "There is no question but that the Louisiana scheme narrows the class of death-eligible

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[45] The Fifth Circuit acknowledges that its test "emerges from the same fundamental concerns discussed by the *Johnson* en banc majority." 945 F.2d at 820-821 n.15. *Johnson* scorns the notion of individualized consideration and lampoons the rule of *Lockett*: "In *Lockett* . . . the Court did not merely tolerate discretion, but mandated it!" 938 F.2d at 1180.

[46] Thus, in Louisiana, one who is ineligible for a death sentence is also ineligible for a conviction of first degree murder. *See* La. Rev. Stat. Ann. 14:30 (West 1986) and La. Code Crim. Proc. Ann. Art. 905.4 (West 1984).

murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more." *Lowenfield v. Phelps* 484 U.S. 231, 246 (1988). And certainly, the Constitution requires *no less*. Nor does Louisiana law, which respects the rule of *Lockett* by providing that "[t]he sentencing hearing shall focus on the circumstances of the offense and *the character and propensities of the offender*." La. Code Crim. Proc. Ann. Art. 905.2 (West 1984) (emphasis added). "[T]he finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." *Sawyer v. State*, 442 So.2d at 1139 (emphasis in original).

In Louisiana, the real death selection process occurs at the penalty phase, where "the jury is asked to scrutinize the defendant's character, to ascertain whether the offender and the offense fit the statutory scheme for those whom the death penalty has been designed." *Sawyer*, 442 So.2d at 1140. "[Article] 905.2 makes it clear that *the character of the defendant is one of the two most relevant factors* with which the sentencing hearing should be concerned." *Id.* (emphasis added). Only after presentation of mitigating evidence can a jury properly assess an offender's moral culpability and determine whether one who is *eligible* to die is also *deserving* of execution. As a touchstone of innocence, eligibility fails because it refuses to acknowledge the crucial role mitigation evidence plays in any constitutional death sentencing scheme.[47] The Fifth Circuit's eligibility test will *only*

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[47] Due to its infirmities as a true remedy for victims of miscarriages of justice, the eligibility test will doubtless produce anomalous result. *Johnson*, 938 F.2d at 1198 n.4 (Anderson, J., dissenting) (one made death-eligible by a conviction for felony murder at the guilt stage will never be relieved from procedural default or writ abuse regardless of nature and extent of penalty phase error, "even if every prosecution witness at the sentencing phase lied on the witness stand or every statutory mitigating factor . . . was supported by actual fact but had not been presented by incompetent counsel"). Both the Eighth and Ninth Circuits have formulated miscarriage of justice standards more consistent with the rule of *Lockett* and the equitable principles which govern the

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consistently protect those who *could not* have been sentenced to death but will not protect those who *would not* have been sentenced to death but for a fundamentally distorted sentencing profile. Because "a consistency produced by ignoring individual differences is a false consistency," *Eddings*, 355 U.S. at 112, eligibility is incapable of protecting true victims of miscarriages of justice.

III. THE REFUSAL OF THE LOWER COURT TO REVIEW THE MERITS OF MR. SAWYER'S CLAIMS OF CONSTITUTIONAL ERROR WILL RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE; HE IS ENTITLED TO A HEARING TO DETERMINE WHETHER HIS CONVICTION AND SENTENCE OF DEATH VIOLATE THE CONSTITUTION.[48]

A. Mr. Sawyer's False Sentencing Profile Distorted And Perverted The Fact Finding Process.

It cannot be denied that the Mr. Sawyer's sentencers heard false and misleading evidence about his mental state.

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Writ of Habeas Corpus. *Deutscher v. Whitley*, 946 F.2d 1443 (9th Cir. 1991); *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1990); *Smith v. Armontrout*, 888 F.2d 530, 545 (8th Cir. 1989).

[48] Assuming, but not conceding, the Fifth Circuit's proposed test is proper, that court failed to properly apply state law in its analysis. The Louisiana Supreme Court is obligated to review a sentence of death for arbitrariness, sufficiency of the evidence, and proportionality. Rules of the Supreme Court of Louisiana, Rule 28(1). While noting that a "trier of fact" can be an "appellate court," 945 F.2d at 820 n. 13, the Fifth Circuit failed to recognize the state supreme court's obligation on direct appeal.

An example of the state court's review is found in *State v. Sonnier*, 380 So.2d 1 (La. 1979). On direct appeal, the court found sufficient evidence to uphold the six aggravating circumstances found by the jury in support of its verdict of two death sentences. The mitigation consisted of Sonnier's state of mind at the time of the offense and his scant criminal record. Under its obligation, to determine whether the jury "disregard[ed]

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Nor can it be denied that the false and misleading evidence caused the sentencers' deliberations to be perverted.

The true evidence about Mr. Sawyer's mental condition and childhood history provide clear explanations for understanding his violent actions. The sentencers, however, were precluded from learning that Mr. Sawyer's mental handicaps prevented him from "comprehend[ing] that the increasingly destructive physical abuse of the victim would lead to her death." JA 545. The error prevented Mr. Sawyer from developing psychiatric defenses which would have caused at least one sentencer to reject the death penalty.[49] His true character was absent from the fact finding process thereby undermining that process and foreclosing a correct understanding of his true culpability.

1. Mr. Sawyer's Jury Heard That He Is A Sociopath.

Mr. Sawyer's trial counsel knew well in advance of trial that he had been previously treated in a psychiatric hospital and had been placed in special education classes as a child.[50]

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numerous and persuasive mitigating circumstances that clearly outweigh [the] aggravating circumstances," the supreme court reversed the death sentence.

In order to accurately determine whether the sentence in this case is proper under state law, the lower court should have remanded the case to the state supreme court in order for that court to perform its review under Rule 28 in light of all the evidence proffered in the habeas petition.

[49] In Louisiana, if one juror determines a death sentence is "inappropriate," a life sentence results. La. Code Crim. Proc. Ann. Art. 905.6 (West 1984); *see e.g. State v. Loyd*, 459 So.2d 498, 503 (La. 1984).

[50] *See*, sanity commission reports at JA 341-346. Pursuant to La. Code Crim. Proc. Ann. Arts. 643 and 644 (West 1984), the trial court appointed two doctors to a sanity commission to determine whether Mr. Sawyer was competent to stand trial. The doctors based their findings solely on brief interviews where Mr. Sawyer reported that he had been in a psychiatric hospital and in special education classes. *Id.*

Further, trial counsel believed that Mr. Sawyer would definitely be found guilty.[51] Nevertheless, trial counsel pursued one ill-conceived and poorly planned strategy – a guilt phase defense of "toxic psychosis." In support of this defense, counsel called the two sanity commission members.

Dr. Arneson testified on direct examination that her diagnosis of Mr. Sawyer was, "Probable sociopathic personality." JA 472. When examined by the prosecutor, she testified:

> A. A sociopathic personality is an individual who has for whatever reason, we really don't know why they have difficulties incorporating a super ego consciousness and they are, they will do anything without any feeling of guilt or remorse, do whatever they think they can get away with. . . .
>
> Q. . . . It says you testified at a hearing in this Court on June the 12th, 1980. We asked what a sociopathic personality was and you said these individuals have great problems in terms of super-ego, by that I mean conducting themselves according to the rules of society. They are usually very impulsive to which they do what they feel like doing. They have low frustration tolerances, no guilt or feelings of guilt. If they do perform some act that is in opposition to society, that type of thing, that would be an accurate statement?
>
> A. Yes. [JA 478-479].

She further testified that sociopaths are aware of what is right or wrong, have very little guilt, and will "blow[ ] another person's brains away" to silence the witness to a crime. JA 480. Her testimony implied that Mr. Sawyer was a sadist, and she described a sadist as one "who gets sexual pleasure or satisfaction from torturing or making other people suffer pain." JA 480-481.

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[51] At the 1985 state hearing, counsel stated that the nature of the state's evidence was "Overwhelming. It was – I never had any delusions in this case about, you know, Mr. Sawyer being found not guilty. So you know, I mean it really came down to two things, I mean what was I going to tell these people; *how could I try to mitigate*." SH 129 (emphasis added).

Dr. DeVillier testified that the crime was committed by a person who was more likely than not a sociopath. JA 465. On cross-examination, Dr. DeVillier described sociopaths as those who are "constantly in trouble with the law. . . . " JA 463. Dr. Devillier thought Sawyer to be a sociopath "in various degrees." JA 464.

He also testified that a sadist enjoys inflicting pain on others and that a sadist may also be considered antisocial. JA 465. This area of cross-examination concluded with the witness suggesting that Mr. Sawyer is a sadist, and stating "it is possible" that Mr. Sawyer achieved "orgasmic feelings" without "active intercourse" as sadists often do. JA 465-467.[52]

Thus, the jury heard that (i) Mr. Sawyer is a sociopath; (ii) he is possibly a sadist; (iii) a sociopath does not have a conscience, does not feel guilt or remorse, is not concerned with the pain and suffering of others, will "blow another person's brains away" to avoid detection, and does not care about the morals of society; and (iv) a sadist is a warped individual who enjoys inflicting pain on others in order to achieve sexual gratification.

Counsel repeated this inaccurate diagnosis during summation at the penalty phase:

> I don't know what I can say for Robert Sawyer. He is a poor miserable human being. He has had a hell of a life. He was involved in a very heinous act. He has been in a mental hospital. *Like Doctor Arneson*

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[52] The prosecutor exploited this description in closing argument: "*Robert Sawyer a sociopathic individual, a man who has no conscience*, who knows and intends what he does but doesn't care about the results of his actions like most criminals according to Doctor Devillier and Doctor Arneson beat and tortured Frances Arwood and *got off to it*." TR 1451 (emphasis added).

told you probably a sociopath. [JA 535. (emphasis added)].

2. Mr. Sawyer Is Not A Sociopath. He Suffers From Organic Brain Damage And Mental Retardation.

The district court was presented with records from Mr. Sawyer's prior mental health treatments and recent mental health evaluations. These documents show that Mr. Sawyer is neither a sociopath nor a sadist and that he has never been diagnosed as being a sociopath except by Dr. Arneson.[53]

At age fourteen, Mr. Sawyer began treatments at the Gailor Mental Health Clinic, where he was diagnosed as being "*moderately retarded, chronic brain syndrome* manifested by moderate retardation and abnormal EEG." JA 538. From February, 1965 to December, 1966, he was continually treated with anti-psychotic medications.

In June, 1966, Mr. Sawyer was committed to the psychiatric ward of John Gaston Hospital. R 181. Unsuccessful attempts were made to commit him to the Western State Hospital and he was discharged back to the Gailor Clinic. His diagnosis remained the same as determined at the Gailor Clinic. R 188.

On August 16, 1966, Mr. Sawyer was adjudicated incompetent by the Probate Court of Shelby County, Tennessee (R 204), and committed to the Western State Psychiatric Hospital. He was provisionally diagnosed as "mental deficiency, idiopathic, mild with psychotic reaction," and was treated with electroconvulsive therapy. R 217. He was discharged five months later with a diagnosis of "Schizophrenic reaction,

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[53] Dr. Arneson testified at the competency hearing that her diagnosis of "probable sociopathic personality" could not be more definite without a full evaluation, noting that she would need a more reliable history. She stated that she did not think Mr. Sawyer suffers from brain damage. TR 442. She also declined to order a "brain scan," reporting that it would not "determine lack of mental capacity or the extent of mental capacity." JA 343.

childhood type." JA 540. Within three weeks, Mr. Sawyer was adjudicated incompetent. JA 540.

Recent evaluations, submitted to the district court, are consistent with the earlier diagnoses. Dr. Whyte, a psychiatrist, diagnosed Mr. Sawyer as suffering from Organic Personality Syndrome (formerly Chronic Brain Syndrome) and Mild Mental Retardation. JA 548. Dr. Devinsky[54] reports that "Mr. Sawyer's neurological examination confirm[s] global cognitive impairment and specifically point[s] to evidence of prefrontal dysfunction." JA 544. A Magnetic Resonance Imaging brain scan revealed abnormalities[55] which further "supports the diagnosis of trauma-induced frontal lobe injury." JA 547. Dr. Fisher, a psychologist, administered a series of psychological, neurological and intelligence tests to Mr. Sawyer and found "considerable indicators of both neurological dysfunction (brain damage) and a mild level of mental retardation (current full-scale IQ measured 68)." JA 566. Dr. Fisher emphasized that any diagnosis of psychopathic trends should not have been made for [Mr. Sawyer] . . . without previously ruling out the possibility of brain damage." JA 568.

Mr. Sawyer's brain damage is located in the frontal lobes. "The prefrontal areas play an important role in controlling basic drive functions such as sexual and aggressive thoughts and actions. Prefrontal brain injury results in an inability to inhibit and control aggressive thoughts and actions. It affects the decision-making process: impulsive action precedes measured consideration." JA 544-545. The forensic relevance of frontal lobe damage is that:

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[54] Dr. Devinsky is the Chief of the Department of Neurology and Director of the Comprehensive Epilepsy Center at the Hospital for Joint Diseases, and Associate Professor of Neurology at New York University. JA 541.

[55] "The MRI shows a small punctate focus of increased proton density in the subcortical white matter of the medial left frontal lobe. . . . Furthermore, there is a signal void on both the T1 and T2 weighted images in the superior sagittal sinus, consistent with thrombosis." JA 546.

> Robert's behavioral symptoms fall mainly in the characteristic area of poor impulse control with regard to hyper-aggressive and hyper-sexual impulses. . . . [JA 552]. The impulsive aspect of Robert Sawyer's behavior in response to emotional interpersonal situations or to his own aggressive and/or sexual mood occurs with minimal, if any, intellectual reflection. Any experiences such as moral culpability, consideration for others involved or any understanding of the generalized significance of his behavior is lacking regardless of outward appearances. His behavior in response to emotional signals is akin to a reflex arc having perhaps ritualistic but not truly rational significance. [JA 555].

Organic Personality Syndrome, "complicated by mild mental retardation, has seriously compromised, and continues to compromise, [Mr. Sawyer's] capacity for reflective behavior," JA 556, to such an extent that his "aggressive impulses dominated his behavior for a period of time during which he could not comprehend that the increasingly destructive physical abuse of the victim would lead to her death." JA 545.

Both Drs. Whyte and Devinsky reported that the likely etiology of Mr. Sawyer's brain damage and dysfunction is childhood head trauma suggestive of severe physical abuse.[56]

> His history is also remarkable for several episodes of significant head trauma with loss of consciousness for periods of between 45-120 mins. At

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[56] Dr. Whyte's review of Mr. Sawyer's medical records noted the cause of head trauma as "alleged" because "Although Robert's father and grandmother related these events to various medical personnel over several years, I have expressed the reservation ("alleged") because there exists here a pattern of early life trauma suggestive of severe physical abuse. For example, (1) no medical attention was sought for the above-mentioned comatose states; (2) somewhat suspicious explanations of prolonged unconsciousness are offered (falling from a *bicycle* at *age 5*; a fight with another boy in later childhood); a history of other early-life trauma (broken arm at age 4); and, finally the history given by Robert and other family members of frequent, often severe, beatings by his father." JA 551.

> age 5 years he fell off a bicycle and was unconscious for approximately 2 hours. At age 15 years he states he was kicked in the head by a horse and was unconscious for an unknown duration (one medical report states 2 hours) but first recalled events in the hospital approximately 60 hours later (corresponding to the period of post-traumatic amnesia). At age 21 years he was in a motor vehicle accident and sustained head trauma with loss of consciousness for approximately 2 hours. He lost his left eye in the accident. At age 25 years he was struck in the head by a car jack and suffered a loss of consciousness lasting 45 minutes and a 2 inch laceration on his upper forehead near the midline, with a residual scar.
>
> In addition, a family member reports that Mr. Sawyer's mother attempted to suffocate him- . . . when he was 3 months old . . . Suffocation with lack of oxygen to the brain may be the cause of Mr. Sawyer's mental retardation and neurological behavioral disorder.
>
> Other records reveal . . . [and] Mr. Sawyer states that he received 3 shock treatments per day for a period of one month. . . . this therapy may have caused brain injury. [JA 542].
>
> Although brain damage could be the result of a prenatal event or neonatal anoxia, the history most strongly suggests a post-concussion etiology following single or repeated head trauma. [JA 551].

3. Mr. Sawyer's Jury Heard False And Misleading Reasons For His Prior Hospitalization; In Fact, He Was Committed After Being Adjudicated Mentally Ill And Incompetent.

A brief reference to one of Mr. Sawyer's prior hospitalization was made by his sister, Glenda White, at the penalty phase.

> "Because of his running away . . . they put Robert in the state mental hospital for no reason and they gave him drugs. Well, I don't know what they were. .

> I know they kept him where you just sat around and didn't give anybody any trouble. You didn't have any energy to get up and walk around. When he resisted taking those drugs they gave him shock treatments as punishment and he stayed there until he got out to get away and he took off from there and went to Chicago." [JA 509-510].

Thus, the jury heard false and misleading reasons to explain this one, uncorroborated reference to Mr. Sawyer's psychiatric treatments. The jury learned that he was hospitalized either because he was a sociopath[57], because he kept running away, or "for no reason."

The true reason why Mr. Sawyer was hospitalized was because authorities concluded that his behavior, manifested by brain damage and mental retardation, required involuntary treatment. Mr. Sawyer was treated at the Western State Psychiatric Hospital because on August 16, 1966 he was "declared and adjudicated mentally ill and incompetent." R 204. The court ordered him to be committed to the hospital.

Further, although the jury did not learn about other mental health treatments, Mr. Sawyer was committed to the psychiatric unit of the John Gaston Hospital; he was "brought in on lunacy warrant" initiated by the juvenile court. R 181.

4. Mr. Sawyer's Jury Did Not Hear The True Facts About His Childhood; In Fact, His Childhood Is A Tragic Story Filled With Abuse.

Trial counsel effectively placed the whole case of mitigation in the hands of Glenda White. White's testimony, however, fell woefully short of establishing the true, compelling story of Mr. Sawyer's childhood experiences, a story of frailty that could and should have been presented with other lay and expert witnesses and readily available documents.

---

[57] Defense counsel told the jury: "He was in a mental hospital. Like Dr. Arneson told you probably a sociopath." JA 535.

White mentioned that her mother's suicide caused Mr. Sawyer's twin sister to be given away to an aunt, and described her father as being a strict disciplinarian who instilled the value of hard work in Mr. Sawyer. JA 506-507. She noted that the father's character and needs of the family farm prevented Mr. Sawyer from engaging in normal childhood recreation. JA 507-508. She noted that when Mr. Sawyer entered adolescence, she married and left the household. JA 507. The jury learned that Mr. Sawyer had a propensity for running away from home and "they put Robert in the state mental hospital for no reason." JA 509. White closed by discussing Sawyer's nonviolent, caring nature and his Arkansas conviction. JA 515-516.

Mr. Sawyer's aunts have a much better understanding of his difficult childhood than White. Each has witnessed the cruelty of the father towards Mr. Sawyer's mother and Mr. Sawyer. They would have testified that Mr. Sawyer's father abused and raped his mother to such an extent that they believe she committed suicide in order to escape his torture. They would have testified that the father's relentless physical and emotional abuse made petitioner into a lonely, withdrawn, confused child without any self-confidence. JA 569-584.

5. The Evidence Of Brain Damage, Mental Retardation, And Tragic Childhood Shows That The Jury Would Not Have Sentenced Mr. Sawyer To Death.

It is clear that courts consider evidence tending to diminish the culpability of the defendant based upon mental state as the most important mitigation evidence. Mental health evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior." *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988)). Such evidence not only acts to reduce the personal and moral culpability of a defendant, "it also can significantly weaken the aggravating factors." *Id.* (citation omitted).

In Louisiana, "[t]he jury is asked to scrutinize defendant's character to ascertain whether the offender and the

offense fit the statutory scheme for those whom the death penalty has been designed." *Sawyer v. State*, 442 So.2d 1136, 1140 (La. 1984); La. Code Crim. Proc. Ann. Art. 905.2 (West 1984). Because "the finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process," (*id.* at 1139 (emphasis in original)), "the jury [must] receive adequate and *accurate* information regarding the defendant['s]" character. *State ex rel. Busby v. Butler*, 538 So.2d 164, 172 (La. 1988) (emphasis added). Accurate mental state evidence is crucial in determining whether the offender's culpability makes him deserving of death.

Defense counsel's incompetence foreclosed the meaningful exploration and presentation of psychiatric defenses which would have significantly weakened the effect of the state's penalty phase evidence.[58] The state presented evidence of Mr. Sawyer's prior involuntary manslaughter conviction,[59] and argued that the instant crime was "committed in an especially heinous or cruel manner." La. Code Crim. Proc. Ann. Art. 905.4(g) (West 1984). The psychiatric defenses available to Mr. Sawyer would have allowed him to present an explanation of the aggravating evidence. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977) (defendant is entitled the "opportunity to deny or explain" aggravating evidence). An explanation as to how Mr. Sawyer's brain damage and mental retardation affects his behavior would have rebutted the impact of the state's evidence.

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[58] The true mental condition of Mr. Sawyer would have established at least two statutory mitigating circumstances regarding mental state. *See* La. Code Crim. Proc. Ann. Art. 905.5(b) and (c) (West 1984).

[59] Mr. Sawyer pled not guilty to a charge of second degree murder in Pulaski County, Arkansas in 1974. The case was "submitted to the Court and after hearing the testimony of the witnesses, the charge [was] reduced to Involuntary Manslaughter." State's Penalty Phase Exhibit 1, at 3. This aggravating factor was reversed on direct appeal. *State v. Sawyer*, 442 So.2d at 101 On remand, the court held that the prior conviction was lawfully introduced due to the statutory requirement that the jury focus on the character of the defendant. *Sawyer v. State*, 442 So.2d 1136 (La. 1984).

Absent the error, the jury would have been told that Mr. Sawyer's mental handicaps prevented him from "comprehend[ing] that the increasingly destructive physical abuse of the victim would lead to her death." JA 545. His ability to anticipate the consequences of his actions and to control his impulsivity due to brain damage is aggravated by his mental retardation. The two conditions have "seriously compromised . . . [his] capacity for reflective behavior." JA 556. Mr. Sawyer's disabilities would have provided meaning to a seemingly unexplainable event.[60]

A diagnosis of mental retardation requires the person to have a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" and requires that the disability must have been "manifested during the developmental period." American Association on Mental Retardation, *Classification in Mental Retardation* 1 (H. Grossman ed. 1983).[61] Persons with mental retardation "have a reduced ability to cope with and function in the everyday world." *City of Cleburne v. Cleburne Learning Center*, 473 U.S. 432, 442 (1985).[62] Mr. Sawyer's "reduced ability" is found in every dimension of his cognitive and behavioral functions, "including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation."

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[60] In 1990, the Court began its description of the facts of this case with the observation that Sawyer participated in harming Arneson "[f]or reasons that are not clear." *Sawyer v. Smith*, ___ U.S. ___, ___, 110 S.Ct. 2822, 2825. Mr. Sawyer's proffered evidence of his mental disabilities provides clear explanations for his actions.

[61] The term "general intellectual functioning" refers to the results of intellectual testing; the term "adaptive behavior" refers to an "individual's effectiveness in meeting societal standards of maturation, learning, personal independence and/or social responsibility that are expected for his or her age level and cultural group." *Id.*

[62] *See generally*, R. Conley, R. Luckasson and G. Bouthilet, *The Criminal Justice System and Mental Retardation*, (1992); R. Perske, *Unequal Justice?*, (1991).

Penry v. Lynaugh, 492 U.S. 302, 345 (1989) (Brennan, J., concurring in part, dissenting in part, citing Brief of *Amici Curiae* American Association of Mental Retardation, *et al.*, 6). Among the many impairments resulting from mental retardation, the most serious occur in logical reasoning, strategic thinking, and foresight.[63] Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 Merrill-Palmer Q. 167, 178 (1982). Mr. Sawyer's ability to anticipate the consequences of his actions is grossly impaired due to his subnormal intellectual skills and gross deficits in his adaptive behavior.

There is a "belief, long held in this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). A jury assessing punishment must be made aware of the defendant's mental state at the time of the crime because such evidence reflects the degree of moral culpability and blameworthiness. *See Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 135, 156 (1987) ("A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime").

Mr. Sawyer's crippling mental disabilities were richly documented prior to his trial, but counsel failed to obtain any such evidence even though he knew his client had been in a mental hospital. Instead, counsel presented evidence that Mr. Sawyer had been in a mental hospital "for no reason." And instead of presenting evidence of Mr. Sawyer's mental retardation and brain damage, counsel promoted a highly inaccurate and extremely prejudicial diagnosis of sociopathy. Counsel's ineffectiveness both "precluded the development of

---

[63] Mr. Sawyer has a "prominent, specific defect in information processing, namely, an inability, or severely impaired ability, to perform abstract thinking, to make generalizations or to understand abstract concepts." JA 554.

true facts and resulted in the admission of false ones. . . . " *Smith v. Murray*, 477 U.S. 527, 538 (1986). Counsel's conduct also "had the effect of foreclosing meaningful exploration of psychiatric defenses." *Id.* Because Mr. Sawyer would not have received a death sentence[64] but for the distorted picture of his culpability, he is actually innocent of the death penalty.

B. The State Prevented Mr. Sawyer From Presenting A Defense Of Factual Innocence By Suppressing Exculpatory Evidence.

The state's case against Mr. Sawyer revolved around the testimony of its star witness, Shano, and circumstantial evidence, a lighter fluid can bearing Mr. Sawyer's fingerprints. Shano's four year old son, Wayne, was present in the house at the time of the offense. Wayne was interviewed by Detective Livaudais the day after the arrest and told the detective that Mr. Sawyer did not set fire to the victim but rather Lane did. He also directed the detective to another can of lighter fluid, the one Mr. Sawyer alleges Lane used to set fire to the victim. This evidence was never revealed to trial counsel. Further undisclosed exculpatory evidence existed which would have destroyed Shano's credibility. Shano sold her testimony at trial for a promise that she would not be prosecuted.

Mr. Sawyer presented an affidavit of Diane Thibodeaux, a friend of Shano's, to the district court. Thibodeaux, known as "nanny" to Shano's children, comforted Wayne when he was questioned by Detective Livaudais the day after the crime. JA 586. Wayne told the detective that Lane put lighter fluid in a "shiny thing you put cigarettes in" and poured it over Arwood, then it "went poof." JA 587. Wayne said that "Daddy [Mr. Sawyer] tried to help the lady" but was knocked away by Lane and he fell into a chair. JA 587. Wayne also

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[64] This is true under the "fair probability" test, *Kuhlmann v. Wilson*, 477 U.S. 436, 455 (1986), or under the "more likely than not" standard urged by Judge Anderson. *Johnson v. Singletary*, 938 F.2d 1166, 1200 (11th Cir. 1991) (*in banc*) (Anderson, J., dissenting).

showed the detective the garbage can where a lighter fluid can and cigarette case were found. JA 587.[65]

Mr. Sawyer also presented affidavits from Shano's friends and former mother-in-law exposing the grant of immunity given to Shano by the state. JA 591-592, 596-597, 603. Part of Shano's motivation for testifying was that she abused her children and was under investigation at the time by state authorities.[66] JA 605-608.

The Fifth Circuit ruled that the evidence presented in the habeas petition does not

> raise a fair probability that a rational trier of fact would have entertained a reasonable doubt as to whether to convict or sentence Sawyer to death. The specific facts that Sawyer now raises do not show that he is innocent either of the murder of Arwood or of both of the valid aggravating circumstances. . . . [Appendix A (per curiam correction to the third paragraph under Section II.E.) (footnotes omitted)].

The court erroneously reasoned that Mr. Sawyer could be found guilty as a principal if not the actual perpetrator of the arson. *Id.* at n.21.

The court is flat wrong in its understanding of state law. In order to be found guilty as a principal, the defendant must "knowingly participate in the planning or execution of a crime." *State v. Knowles*, 392 So.2d 651 (La. 1980); *State v. Holmes*, 388 So.2d 722, 727 (La. 1980) (intent cannot be imputed). Mere presence does not in any way rise to a knowing participation, planning or execution. In fact, the

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[65] The lighter fluid can entered into evidence by the state was seized on the day of the crime from the kitchen table. TR 1251.

[66] At trial the prosecutor asked Shano a rather innocuous and seemingly irrelevant question: "Have you tried to keep your children?" R 1204. The prosecutor was obviously aware that Shano had been under investigation by state authorities for abusing and neglecting her children since 1977. Nine months after the trial, Shano's children were placed in custody of the state and placed in a foster home. Subsequently, she lost all custody. JA 607.

evidence shows not only that Mr. Sawyer did *not* burn the victim, but rather *he tried to prevent Lane* from doing so. In light of his attempt to *prevent* the aggravated arson, a fair probability exists that the jury would not have found a specific intent to *commit* aggravated arson.[67]

The suppressed evidence of the grant of immunity to Shano also supports Mr. Sawyer's colorable showing of factual innocence. Had the jury learned that Shano sold her testimony in order to escape prosecution (and to "keep her children"), her credibility would have been highly questionable due to her bias and interest.

Mr. Sawyer is actually innocent of the death penalty. He has made a colorable showing of factual innocence of the crime. *Kuhlmann v. Wilson*. But for the suppression of exculpatory evidence, there is a fair probability that the jury would have entertained a reasonable doubt about Mr. Sawyer's guilt of first degree murder, and therefore he would have never entered the penalty phase. As noted *supra*, the jury found the existence of aggravated arson (and rejected the state's argument of aggravated rape) as the aggravating circumstance that made this murder a first degree murder.[68] A murder without specific underlying factors (e.g. other enumerated felonies and characteristics of the victim) is a second degree murder under Louisiana law. *See* La. Rev. Stat. Ann. 14:30 and 14:30.1 (West 1986).

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[67] However, even if the jury determined that Mr. Sawyer was a principal to the arson, the suppressed evidence would have established another mitigating circumstance: "The offender was a principal whose participation was relatively minor." La. Code Crim. Proc. Ann. Art. 905.5(g) (West 1984).

[68] Even under the proposed "eligibility" test, Mr. Sawyer need not challenge the existence of the penalty phase aggravating factor of "heinous, atrocious or cruel" because, under state law, by making a colorable showing of the absence of aggravated arson, Mr. Sawyer shows that he *was* ineligible for death, and at most, only eligible for a sentence of life imprisonment. La. Rev. Stat. Ann. 14:30.1 (West 1986).

CONCLUSION

For the above reasons, this Court should reverse the Court of Appeals' decision and remand this case for a hearing on the merits of Mr. Sawyer's claims of constitutional violations. Alternatively, should this Court uphold the Court of Appeals' proposed test, this case should be remanded to the federal district court for a hearing on the merits of the claim that the state withheld exculpatory evidence, and to the Supreme Court of Louisiana to determine whether Mr. Sawyer is "eligible" for the death penalty under state law, specifically, Louisiana Supreme Court Rule 28.

Respectfully submitted,

* Nicholas J. Trenticosta
R. Neal Walker
Sarah L. Ottinger
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

Counsel for Petitioner

Of Counsel:

John H. Holdridge
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

*Counsel of Record

APPENDIX A

La. Rev. Stat. 14:30 First degree murder

First degree murder is the killing of a human being:

(1) when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) when the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purposes of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension

of sentence in accordance with the determination of the jury.

La. Rev. Stat. 14:30.1 Second degree murder

Second degree murder is the killing of a human being:

(1) when the offender has a specific intent to kill or to inflict great bodily harm; or

(2) when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

La. Code Crim. Proc. Art. 905.2 Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on

the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

La. Code Crim. Proc. Art. 905.4 Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious or cruel manner;

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant;

(i) the victim was a correctional officer or any employee of the Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney or district attorney's investigator.

La. Code Crim. Proc. Art. 905.5 Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

La. Code Crim. Proc. Art. 905.6 Jury; unanimous recommendation

A sentence of death shall be imposed upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Supreme Court Rule 28(1)

Rule 905.9.1 Capital Sentence Review (applicable to La. Code Crim. Proc. Art. 905.9)

Section 1. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

APPENDIX B

Robert Wayne SAWYER,
Petitioner-Appellant,

v.

John P. WHITLEY, Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 91-3658

United States Court of Appeals,
Fifth Circuit

Nov. 12, 1991

Appeal from the United States District Court for the Eastern District of Louisiana; Henry A. Mentz, Jr., Judge.

Before KING, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

The third paragraph under Section II.E. of our opinion in *Sawyer v. Whitley*, 945 F.2d 812 No. 91-3658 (5th Cir. 1991), is deleted and the following is substituted therefor:

Nor does this evidence raise a fair probability that a rational trier of fact would have entertained a reasonable doubt as to whether to convict or sentence Sawyer to death. The specific facts that Sawyer now raises do not show that he is innocent either of the murder of Arwood[21] or of both of the valid aggravating

---

[21] Saywer need not have been the actual perpetrator of the aggravated arson for a jury to find him guilty of that crime. *See* La.Rev.Stat.Ann. art. 14:24 (defining principals of a crime as all persons who aid and abet in the commission of a crime,

(Continued on following page)

circumstances[22] the jury found before recommending the death penalty.

(Continued from previous page)

whether directly or indirectly). He does not contend that he was not present while Frances Arwood was being burned. Furthermore, he does not deny that his fingerprints were found on a can of lighter fluid at the crime scene, a fact which the jury considered in finding aggravated arson.

[22] As recounted above, Sawyer beat and scalded Arwood with boiling water. *See also Sawyer v. State*, 442 So.2d 1136, 1140 (La. 1983) (pointing to "overwhelming evidence of the heinous nature of the principal offense" in affirming Sawyer's sentence). Nothing Sawyer adduces now contradicts the fact that he participated in torturing Arwood.

Supreme Court, U.S.
FILED
JAN 31 1992
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No. 91-6382

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, Louisiana State Penitentiary,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE RESPONDENT

JOHN M. MAMOULIDES
District Attorney
DOROTHY A. PENDERGAST*
Assistant District Attorney
Attorneys for Respondent
Courthouse Annex
Gretna, Louisiana 70053
(504) 368-1020

* *Counsel of Record*

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QUESTIONS PRESENTED

1. How should the "actual innocence" of the crime standard of *Kuhlmann v. Wilson* be applied to questions of alleged sentencing error in a capital case presented in a successive or abusive habeas corpus petition?

2. Under the standard to be used when determining whether "actual innocence of the death penalty" exception should permit consideration of claims presented in a successive or abusive habeas corpus petition, should the focus be on the objective factors which control the eligibility of the defendant to be considered for a sentence of death?

PARTIES TO THE PROCEEDINGS

Robert Sawyer, Petitioner

Nicholas J. Trenticosta, Counsel Of Record For Petitioner

R. Neal Walker, Counsel For Petitioner

Sarah L. Ottinger, Counsel for Petitioner

John H. Holdridge, Of Counsel

John P. Whitley, Warden, Louisiana State Penitentiary

Richard Ieyoub, Attorney General For The State Of Louisiana

John M. Mamoulides, District Attorney, Parish of Jefferson
State of Louisiana

Dorothy A. Pendergast, Assistant District Attorney

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No. 91-6382

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, Louisiana State Penitentiary,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Course of Proceedings Below

The state acknowledges the procedural history as recited by petitioner.

Factual Summary

The following statement of facts is essentially as found in *State v. Sawyer*, 422 So. 2d 95 at 97, 98 (La. 1982) and the trial transcript.

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms.

Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reason behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood, in his presence, was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath because nobody wanted to look [at] her "funky whory ass" that way. When she resisted defendant kicked her in the back of the head with his shoes which had taps on the ends. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood

by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, which defendant actually left the bathroom to boil, while Lane kept a watch over Arwood (a period during which he may have raped Arwood). When defendant returned to the bathroom they administered additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, with both of his feet while letting out a yell, causing her head to strike either the tub or the adjacent window sill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down onto the floor. While on the floor, defendant walked on her back and Lane kicked her in the ribs. Defendant then beat her with a belt as she lay on the floor. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and set the lighter fluid afire. Lane told Shano, as he and Sawyer laughed about it, that his penis had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. Shano, then heard Sawyer tell Lane, "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get."

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died. *State v. Sawyer, supra* at 97, 98.

Petitioner initially pled not guilty and not guilty by reason of insanity but withdrew that plea and went to trial on a plea of not guilty with a defense of toxic psychosis. Before trial petitioner filed a motion to appoint a sanity commission and to order medical observation and test (JA 339). The two psychiatrists found that petitioner was competent; That he understood the proceedings against him and that he could assist his counsel at trial. (JA 344, Dr. De Viller's report and JA 341, Dr. Arneson's report). Thereafter, petitioner was found guilty of La. R.S. 14:30, First Degree Murder, and sentenced to death by a twelve person jury. He then began the appellate and post-conviction process based on the claims listed below. The aggravating factor in support of the conviction is aggravated arson; the aggravating factors in support of the death sentence are 1) engaged in perpetration of aggravated arson, 2) committed in an especially heinous, atrocious or cruel manner.

Direct Appeal

Sawyer's direct appeal to the Louisiana Supreme Court addressed the following errors, although the Supreme Court reviews all errors and the sentence for excessiveness by considering if it was imposed under the influence of passion, prejudice or any other arbitrary factors:

1. Insufficient evidence to support the aggravated arson as an aggravating circumstance;
2. Insufficient evidence to support aggravated rape as an aggravating circumstance;
3. Introduction of evidence of prior conviction;
4. Introduction of prior indictment for Second Degree murder;
5. Excessive sentence because at least one aggravating circumstance not supported by the evidence.

(JA 5)

Post Conviction Application

Sawyer's questions presented:

I. Violation of La. C.Cr. P. Art. 512, that requires a counsel for a defendant charged with a capital offense to have been admitted to the bar for at least five years;
II. Ineffectiveness of counsel;
III. Denial of constitutional right of petitioner to decide whether or not to testify;
IV. Prosecutorial misconduct in the penalty phase closing argument;
V. Arbitrary factor infecting by prosecutor into jury deliberations by misleading them as to their role in imposing the death sentence;
VI. Failure of trial court to instruct that defendant is not required to testify;
VII. Trial Court's instruction at the guilt-innocence phase regarding the State's burden of proof beyond a reasonable doubt was in error;
VIII. Same as Claim VII;
IX. Trial court excused jurors who expressed only general opposition to the death penalty. (Witherspoon violation);
X. Violation of Eighth Amendment where sentence of death is imposed where one of the aggravating circumstances is not supported by the evidence;

XI. Inadmissable evidence introduced during capital sentencing hearing.
XII. Petitioner was denied a full and fair hearing in all previous state court proceedings (moot);
XIII. Death qualification of petitioner's guilt phase jury was illegal and unconstitutional;
XIV. Comparative appellate review of petitioner's sentence was constitutionally inadequate;
XV. Petitioner's sentence is excessive and disproportionate;
XVI. Petitioner's sentence is arbitrary and capricious;
XVII. Electrocution is a cruel and unusual means of punishment;
XVIII. Petitioner's sentence is invidiously discriminatory;
XIX. Capital Punishment is an excessive penalty;
XX. The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights.

A hearing was held in the state district court on July 12, 1985, after which these claims were denied with reasons (JA 63,80).

Writ Of Habeas Corpus — United States District Court

Sawyer's claims presented:

1. Improperly death qualified jury;
2. Attorney with less than 5 years violated Equal Protection and Due Process;
3. Ineffective assistance of counsel;
   a) Was admitted to practice for less than five years;
   b) Objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;
   c) Failed to object during voir dire to prosecutor's reference to evidentiary facts that were not later established at trial;
   d) Failed to conduct a meaningful voir dire;
   e) Failed to discuss with petitioner the nature of the defense;

   f) Failed to allow petitioner to testify during the guilt phase of the trial;
   g) Failed to adequately prepare defense witnesses for trial;
   h) Failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;
   i) Did not present a closing argument during the guilt phase of the trial;
   j) Presented an unprepared defense during the penalty phase of trial;
   k) Failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;
   l) Failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and
   m) Made an inadequate closing argument during penalty phase of trial.
4. Prosecutorial misconduct at penalty phase;
5. Improper prosecutorial argument;
6. Deprivation of right to testify;
7. Failure of trial court to properly instruct jury at guilt phase of trial;
8. Unconstitutional jury instruction on burden of proof at guilt phase;
9. Unconstitutional jury instruction at guilt phase regarding specific intent;
10. Improper jury excusal;
11. Arbitrary factor introduced at sentencing phase by unsupported aggravating circumstance;
12. Inadmissible evidence at sentencing introduced arbitrary factor;
13. Petitioner's sentence is excessive and disproportionate;
14. Petitioner's sentence is arbitrary and capricious;

15. Electrocution is a cruel and unusual means of punishment;
16. Petitioner's sentence is invidiously discriminatory;
17. Capital punishment is an excessive penalty;
18. The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights.

The District court denied all of petitioner's claims with written reasons. (JA 86, 141)

Federal Habeas — United States Fifth Circuit

1. Attorney appointed with less than five years admission to bar violated equal protection and Due Process;
2. Ineffective assistance of counsel
   a. failed to ask jurors about their attitudes towards the death penalty during voir dire;
   b. objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well the penalty for manslaughter at the guilt phase;
   c. failed to object to several inadmissible, inflammatory remarks by the prosecutor;
   d. produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as the basis for the defense to negate the specific intent required for first degree murder;
   e. failed to make closing argument at the guilt phase of trial; and
   f. failed to prepare a competent penalty phase presentation.
3. Improper prosecutorial remarks at the sentencing phase under Caldwell.

After a divided panel of the U.S. Fifth Circuit denied these claims (JA 148) an en banc court affirmed the panel opinion. (JA 208)

Writ Of Certiorari To The United States Supreme Court

1. Whether petitioner was procedurally barred from application of the rule announced in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) by *Teague v. Lane*, 489 U.S. 288 (1989) and *Penry v. Lynaugh*, 492 U.S. 302 (1989).
2. Whether petitioner's remarks, if not barred by *Teague-Penry* were improper under *Caldwell*.

The Court determined that petitioner's claim was procedurally barred and affirmed the conviction and sentence by opinion on June 21, 1990.

Charles Lane was tried by a different jury, found guilty of first degree murder and sentenced to life imprisonment. Charles Lane had no prior criminal history other than a DWI from the State of Florida. *State v. Lane*, 414 So. 2d 1223 (La. 1982). Sawyer had a prior conviction for involuntary manslaughter of a four year old child in Arkansas and was sentenced to 3 years in prison for that crime.

SUMMARY OF ARGUMENT

Sawyer, unable to overcome the procedural default in his successive and abusive petition for writ of habeas corpus, tries to resurrect the amorphous "fundamental fairness" inquiry rejected in *Smith v. Murray*, by requesting this Court to adopt his test as the standard for actual innocence of the death sentence alluded to in *McCleskey v. Zant*. However, the standard urged by Sawyer essentially would substitute a pure prejudice inquiry for the present cause and prejudice requirements consistently recognized by this Court as appropriate for successive petitions of writs of habeas corpus. Such a test would destroy all concepts of finality in sentencing as well as violate the core concepts of comity.

The application of Sawyer's proposed definition would allow the federal reviewing court to conduct its own re-weighing of the state discretionary evaluation of the appropriate sentence by the

state fact finder. Re-weighing is inappropriate and would destroy all concepts of finality in capital sentencing by permitting federal courts to re-evaluate claims every time a state prisoner alleges on habeas review that he has procured new mitigating evidence.

Moreover, the test asserted by Sawyer stands predicated on a fundamental conceptual error: The idea that one can be factually innocent of a sentence. Propriety of a sentence and factual innocence of the underlying crime are two different concepts. The actual innocence of *Kuhlmann* relates to the factual question of whether a defendant committed the crime. The propriety of the sentence by contrast presupposes guilt to the crime and merely addresses the appropriate societal response to it.

The only way a person can be innocent of the death penalty, to the extent that the term is appropriate, is by proving the person is innocent of the underlying crime which permits the consideration of the death penalty and, thus, that the person is eligible for a sentence of death. This test would be the most objective and follow the mandate of *Jackson v. Virginia*.

In Louisiana, and some other states, the capital nature of the crime is fixed at guilt by the narrowed definition of capital murder. In yet other states, a first degree murder conviction plus the presence of an aggravating factor give the underlying crime its capital nature. No test should go beyond casting doubt on this eligibility for the death penalty. Going beyond eligibility to fashion a test concerning how the fact finder might view the discretionary aspects of sentencing would circumvent the concept of "actual innocence" and replace it with an inappropriate federal re-weighing of state court capital judgments. This Court should not be drawn into that trap.

Sawyer's claims here are barred under Rule 9(b) as successive and an abuse of the writ. 28 U.S.C.A. § 2254-9(b); *McCleskey v. Zant*. Sawyer's first claim that he was denied effective assistance of counsel and an opportunity for a meaningful individualized sentencing determination was presented to the state and federal

courts on his first writs. The Fifth Circuit en banc reviewed and affirmed the claim of ineffective assistance of counsel based on a failure to prepare a competent penalty phase on Sawyer's first writ to that court. Sawyer's second claim alleges a *Brady* violation such that the prosecutor suppressed exculpatory evidence. This claim and its factual basis were never presented to any court prior to his second writ.

Sawyer fails to show cause and prejudice therefrom for his abuse of the writ. The witnesses were available for depositions and/or statements since the crime. Sawyer does not present an argument that the state obstructed his counsel from contacting these witnesses prior to his trial or his first habeas petition. In fact the state gave open file discovery to defense counsel before trial and to new counsel during the state and federal post-conviction relief stages. Sawyer does not show that he could not have obtained by reasonable means a sufficient basis to allege this claim in his first petition. Moreover, Sawyer fails to show prejudice from the omission of the details of alleged mental illness under the Louisiana sentencing scheme.

Because Sawyer cannot demonstrate cause and prejudice for having omitted the claims and facts supporting them he must show that a failure to address the merits of the claims would be a fundamental miscarriage of justice and this he cannot do.

Neither of Sawyer's claims qualifies him to be actually innocent of the death penalty under the Fifth Circuit definition such that the merits of his claims should be addressed. He does not raise any specific facts to show that he is innocent either of the murder of Fran Arwood or of both of the valid aggravating circumstances the jury found before recommending the death penalty. Moreover, Sawyer's sentencing jury heard an accurate profile in mitigation. According to the DSM-III-R, Dr. Arneson's conclusion that he was a probable sociopathic personality could have been an accurate diagnosis. The definition of sociopathic personality reflects the childhood behavior of Sawyer as established not only at trial but in the records produced by petitioner. Sawyer

is a borderline retard and his behavior throughout the years does not reflect serious impairment of his mentality. Regardless, Louisiana is not a weighing state and the jury is instructed to consider aggravating and mitigating circumstances. Mitigating evidence that does not implicate the validity of the two aggravating circumstances is insufficient to demonstrate that Sawyer is actually innocent of the death penalty.

The state had no exculpatory evidence to suppress. In support of his claims petitioner fabricates an immunity agreement, distorts the police report in regard to Wayne Shano's statement and fabricates a second can of lighter fluid. His claim rests on hearsay statements recalling incidents that happened more than ten years ago. Sawyer's proposed definition would encourage a continued manufacturing of evidence and distortion of the facts to obtain review on a successive federal writ.

Under the law of principals in Louisiana, La. R.S. 14:24, anyone who aids and abets in the commission of a crime, whether directly or indirectly, may be charged and convicted with that crime. The Louisiana Supreme Court reviewed this case for sufficiency of evidence of First Degree Murder and affirmed the conviction. The testimony at trial established that Sawyer locked the front door and had possession of the key, that he intimidated Cynthia Shano, that he actively participated in the beating, scalding, burning, and torture of Fran Arwood. Even in light of the alleged "new" evidence, Sawyer's conviction for First Degree Murder would be affirmed under the Louisiana Law of Principals and *Tison v. Arizona*.

Clearly, Sawyer has not demonstrated that a failure to address his claims would be a fundamental miscarriage of justice and the Fifth Circuit opinion should be affirmed.

ARGUMENT

I.

THE STANDARD FOR DETERMINING WHETHER THERE HAS BEEN A "FUNDAMENTAL MISCARRIAGE OF JUSTICE" IN THE DEATH SENTENCING CONTEXT, SUCH THAT A PETITIONER CAN BYPASS PROCEDURAL BARS, IS THAT THE ALLEGED ERROR MUST UNDERMINE THE ACCURACY OF THE SENTENCING DETERMINATION BY RELATING TO PETITIONER'S ELIGIBILITY FOR THE DEATH SENTENCE.

The United States District Court and the Court of Appeals for the Fifth Circuit failed to find cause that would allow consideration of Sawyer's claims in his successive petition, under *McCleskey v. Zant*, ____ U.S. ____, 111 S. Ct. 1454 (1991); 28 U.S.C.A. § 2254-9(b); and *Wainwright v. Sykes*, 433 U.S. 72 (1977). Nor did the Fifth Circuit find that Sawyer showed actual innocence of the death penalty in order to bypass the procedural bars to address his claims on the merits. Sawyer continues to embrace the language of actual innocence by emphasizing the prejudicial effect that his claims may have had upon his sentencing jury. Sawyer asserts actual innocence of the death penalty so that his claims can fall within the actual innocence exception of *McCleskey*.

This Court has established that a constitutional violation at the guilt phase, which has probably resulted in the conviction of one who is actually innocent, will allow the federal habeas court to grant the writ even in the absence of a showing of cause for the procedural default. *Murray v. Carrier*, 477 U.S. 478 (1986). Sawyer's proposed standard of actual innocence of death sentencing emphasizes the potential prejudicial effect on the jury during the discretionary process to determine the appropriateness of the death sentence. This is a totally subjective and unworkable standard that defies the objective standard applied at the guilt phase where this Court considers whether a defendant is actually innocent of the crime for which he is being tried. His standard would establish a prejudice test absent cause for the procedural default and allow the federal court to address the claims of a petitioner who is not actually alleging that he did not commit the crime. Sawyer's claims are an abuse of the writ. Louisiana

urges this Court to reject his definition.

A. Because A Large Portion Of The Sentencing Phase Is A Moral Inquiry The Definition Of "A Colorable Showing Of Factual Innocence" Of The Death Penalty Must Only Implicate Objective Factors.

Sentencing is by nature a discretionary process. Due to the gravity of a sentence of death, this Court has said that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Gregg v. Georgia,* 428 U.S. 153 (1976). A capital-sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Zant v. Stephens,* 462 U.S. 862 (1983). The sentencer must also remain free to consider in mitigation any relevant evidence proffered by the defendant concerning his background, character, or circumstances of the crime which call for leniency. *Lockett v. Ohio,* 438 U.S. 586 (1978).

In response to the dictates of this Court, the states enacted various capital-sentencing schemes. Some narrowed the class of persons eligible for the death penalty at the definitional stage of capital murder. Other states narrowed the class at the sentencing stage. Whether or not the class eligible for the death penalty has been narrowed at the definitional stage, as in the schemes of most states, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Lowenfield v. Phelps,* 484 U.S. 231 (1988). These sentencing schemes additionally focus on the character and record of the individual offender and the circumstances of the particular crime. *Woodson v. North Carolina,* 428 U.S. 280 (1976). This allows controlled discretion to the trier of fact to select those offenders from the eligible class for whom the death sentence is appropriate. *Gregg v. Georgia, supra.* The sentencing phase of a capital trial

continues to allow the moral inquiry that is described in *Penry v. Lynaugh,* 492 U.S. 302 (1989) by the introduction of mitigating evidence. The process of selecting those eligible defendants for whom death is appropriate is the trier of fact's "reasoned moral response" to the evidence presented by the state and the defendant. Thus, while there are constitutional safeguards present in capital sentencing not present in non-capital sentencing, capital sentencing remains a discretionary process in which there is no "correct" outcome.

In *Smith v. Murray,* 477 U.S. 527 (1986) this Court acknowledged that "actual" as distinct from "legal" innocence did not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offence. The court made clear, however, that actual innocence of the death penalty meant something more than an "amorphous 'fundamental fairness' inquiry" involving " 'substantial, colorable' constitutional claim". *Id.*, at 538.

Likewise, in *Dugger v. Adams,* 489 U.S. 401 (1989), this Court noted that "actual innocence" of the death penalty meant something more than demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence and is far from demonstrating that an individual defendant is probably innocent of the sentence he or she received. These cases make clear that actual innocence of the death sentence involves a far more restrictive standard than that proposed by Sawyer which, essentially, incorporates the standard rejected in *Smith* into the innocence of the death penalty formulation. In reality, for an abuse of the writ to be excused, Sawyer suggests nothing more than a slightly heightened "prejudice" standard which, of necessity, would require federal courts to engage in re-weighing evidence to determine whether the federal judge still agreed with the state sentencer's discretionary determination. Such an approach would turn the case in which abuse of the writ is excused on the basis of actual innocence of the death penalty from the extraordinary case, "into an all too ordinary one." *Murray*

v. Carrier, 477 U.S. at 496; *Dugger v. Adams,* 489 U.S. at 411.

The only definition of a colorable showing of actual innocence which makes sense is one which implicates only those objective factors dealing with a defendant's eligibility to be sentenced to death. Innocence of a "death penalty" can only translate into being unable to receive it. Otherwise, one is speaking not of "actual innocence", but merely of the subjective issue of whether the defendant deserves a particular punishment.

There are classes of persons for whom the death penalty is absolutely unavailable. A defendant may not receive the death penalty for the rape of an adult woman. *Coker v. Georgia,* 433 U.S. 584 (1977) (Plurality;). It is unavailable for those persons who were not major participants in the underlying felony and did not exhibit reckless disregard for human life. *Tison v. Arizona,* 481 U.S. 137 (1987). Persons less than sixteen years of age when they commit the offense are ineligible for capital punishment unless the legislature includes them by the setting of a minimum age. *Thompson v. Oklahoma,* 487 U.S. ____, 108 S. Ct. 2687 (1988). People who are insane are completely immune from capital punishment for the duration of that insanity. *Ford v. Wainwright,* 477 U.S. 399 (1986). Otherwise, when considering whether, for the purpose of excusing an abuse of the writ, a person is "actually innocent" of the death penalty, this Court should dictate that federal courts may look no further than the underlying objective narrowing which creates the class of death eligible defendants.

Once a defendant falls within that narrowed group of murderers for whom death is a possible sentence either by definition of the underlying crime as capital murder, *see e.g.* La. R.S. 14:30, or by the finding of guilt to murder and the presence of one narrowing aggravating factor, the only question concerning the sentence becomes the discretionary one of the propriety of the sentence as determined by the state sentencer. This discretionary area of the fact finder's guided moral inquiry is one as to which reasonable persons from a variety of backgrounds will differ as to the weight to be given or value placed upon the evidence

proffered by the State and the defendant concerning such things as the crime, the defendant's character, background, and past criminal history and other relevant evidence.

In *Bullington v. Missouri,* 451 U.S. 430, 444 (1981), this Court noted that there is no objective measure by which the sentencer's decision can be deemed correct or erroneous so long as it is made within the authority conferred by the legislature. It would, therefore, be incongruous for this Court to permit federal courts to find a "correct" sentencing decision had or had not been rendered, or would be altered by the addition of other evidence in this realm of discretion. Rather, as both the Eleventh and Fifth Circuits have found, actual innocence of the death penalty (to the extent one can be innocent of a third party's response to an act as opposed to the act itself) can only relate to the defendant's innocence to the set of underlying circumstances (capital murder conviction, or murder plus the presence of an objective narrowing factor) which make the death sentence a possibility. *Johnson v. Singletary,* 938 F.2d 1166 (11th Cir. 1991) (en banc); *Sawyer v. Whitley,* 945 F.2d 812 (5th Cir. 1991). To propose any less stringent standard to excuse an abuse of the writ will plunge the federal courts into the quagmire of re-weighing the sentencing evidence. This Court should determine that a fundamental miscarriage of justice in the area of sentencing is limited to the objectively reviewable standard of whether the claimed error makes a colorable showing that a habeas petitioner is ineligible for the death penalty.

B. The Court Foreshadowed Limiting This Inquiry At The Sentencing Phase To The Objective Factors Setting Eligibility For The Death Penalty By Limiting The Basis For a "Colorable Showing Of Factual Innocence" At The Guilt Phase To Probative Evidence Relating To Guilt.

In *Kuhlmann v. Wilson,* 477 U.S. 436 (1986), this Court adopted a standard to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. In the context of the guilt phase this Court stated,

"The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence" *Id.* 454. In the cases in which this Court has developed this concept since *Kulhmann*, it has not enlarged upon this exception to excuse an abuse of the writ as to the guilt stage of a case. There is no basis to expand this exception in the context of "actual innocence" as it relates to the sentencing phase.

In reviewing a second federal habeas corpus writ based on mixed claims in *Antone v. Dugger*, 465 U.S. 200, (1984), this Court stated that the ends of justice would not be served by consideration of those claims previously presented on federal habeas, and declared that the presentation of claims for the first time constituted an abuse of the writ. The successive claims were denied on ineffective assistance of trial counsel and that the state unjustifiabfy withheld testimony of a confidential informant. The new claims in the second writ were based on *Brady*[1]-*Agurs*[2], impropriety of the State Court, and exclusion of non-statutory mitigating factors. None of these claims went to objective factors which would effect the guilt or innocence of the petitioner. Petitioner was denied review despite allegations of ineffective assistance of counsel, *Brady* violations, impropriety of the Florida Supreme Court, and Eighth Amendment violations.

Petitioner claimed in *Delo v. Stokes*, ____U.S.____, 110 S. Ct. 1880 (1990), for the first time in a fourth federal habeas petition, that he was entitled to a lesser-included offense instruction. This Court said that the equal protection principles asserted by respondent were not novel and could have been developed long before this last minute application for a stay of execution. Thus, this Court did not consider that the lack of a jury instruction to a lesser-included offense at the guilt phase of a capital case was a fundamental miscarriage of justice such that a procedural bar should be bypassed because this issue did not

1. *Brady v. Maryland*, 373 U.S. 83 (1963).

2. *United States v. Agurs*, 427 U.S. 97 (1976).

go to the factual determination of guilt.

In *McCleskey v. Zant*,____U.S.____, 111 S. Ct. 1454 (1991), this Court reviewed a second federal habeas petition that raised for the first time a *Massiah*[3] claim. Because petitioner did not satisfy the cause and prejudice requirement to bypass the procedural bar the court reviewed the claim under the fundamental miscarriage of justice standard. Although the illegally obtained statement was erroneously introduced it did not provide cause nor did it go to objective criteria since it was truthful inculpatory evidence and in no way implicated the actual innocence of the defendant.

Another successive habeas corpus petition was rejected by this Court in *Kuhlmann v. Wilson, supra*, where incriminating statements were improperly obtained by a jailhouse informant and admitted at the guilt phase of the trial. The claim was dismissed because the petitioner failed to make a colorable showing of innocence with probative evidence relating to guilt or innocence.

Throughout these cases this Court continually stressed that the "colorable showing" must be with probative evidence relating to guilt. It failed to find a "fundamental miscarriage of justice" when the claim affected the discretion of the trier of fact, addressed factual inaccuracies not bearing on guilt, regarded improperly admitted evidence, denoted improper instructions to the trier of fact, was based on ineffective assistance of counsel and *Brady* violations. The constitutional error cannot be just factual error, nor prejudicial factual error, but must be prejudicial factual error that goes to the guilt or innocence of the petitioner.

Translating this standard for the guilt phase into the death penalty phase can only mean that the prejudicial factual error must relate to the eligibility of the petitioner for the death sentence as opposed to the more broad standard that is urged by Sawyer. Implications of this definition at the penalty phase are found in

3. *Massiah v. United States*, 377 U.S. 201 (1964).

two cases from this Court.

In a procedural default case, *Smith v. Murray*, 477 U.S. 527 (1986), the petitioner alleged that a psychiatrist's testimony regarding a previous incident on the school bus at the sentencing phase of the trial violated his privilege against self incrimination under the Fifth and Fourteenth Amendments. After this Court determined that there were no cause and prejudice for the default in this case it reviewed the claim for a fundamental miscarriage of justice. In rejecting petitioner's claim, this Court determined that the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. *Id.*, at 538.

A *Caldwell*[4] claim was reviewed for the first time in a second federal habeas petition as a violation at the penalty phase in *Dugger v. Adams*, 489 U.S. 401 (1989). This Court determined that because a *Caldwell* claim was available under state law but defaulted on the direct appeal that the subsequent availability of it as a federal claim did not excuse the procedural default. Although the *Caldwell* error affected the accuracy of the death sentence it did not show that the defendant was "actually innocent" of the crime and denying the claim would not be a "fundamental miscarriage of justice." This Court's prior precedent in the area of "actual innocence" of guilt and "actual innocence", at sentencing suggest the need for a standard far more stringent than that espoused by Sawyer.

Beyond this Court's cases dealing with procedural bar, the cases dealing with the retroactivity of federal decisions likewise argue for the Fifth and Eleventh Circuits' view that the innocence exception to the death penalty be limited to eligibility to be considered for a sentence of death instead of a glorjfied federal court's re-weighing of sentencing evidence. This Court has held that given the collateral role that habeas corpus plays in the system

4. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

of justice, newly announced rules should only be given retroactive effect of habeas review when the rule places certain conduct beyond the power of the state to punish or constitutes such a watershed rule of procedure that it is implicit in the concept of ordered liberty. *Teague v. Lane*, 489 U.S. 288 (1989); *Saffle v. Parks*, 494 U.S.____ (1990); *Sawyer v. Smith*, ____ U.S.____, 110 S. Ct. 2822 (1990). This Court has made clear that state judgments are to be changed in federal review due to new law only under the most limited of circumstances. It should treat a federal court's merits review of state court judgments due to newly alleged factual claims made in successive petitions with similar reverence.

Thus, this Court's prior precedent on actual innocence of guilt as well as its retroactivity cases mandate a standard for actual innocence of the death penalty which does not permit broad inquiry into the discretionary decision making of the state sentencer but only as to objective criteria which would place the defendant beyond the power of the State to punish with a death sentence. The eligibility test espoused by the State to prove actual innocence of the death penalty would prevent wrongful, arbitrary and capricious executions without placing federal courts in the position of re-weighing aggravating and mitigating factors to determine the proper sentence under a given mixture of factors. While petitions which would qualify for this exception to Rule 9(b) would be rare, that is the very desired result set forth in *Kuhlmann* and echoed in *Dugger v. Adams*.

C. Petitioner's Definition That A Successive Claim Can Be Reviewed If There Is A Probability That The Jury Would Have Concluded That A Death Sentence Was Not Warranted Would Do Violence To The Standards Of McCleskey And Diminish The Abuse Of The Writ Doctrine.

Sawyer urges this Court to define the fundamental miscarriage of justice standard as it applies to the penalty phase of a capital case as when the sentencer was seriously misled by the alleged error and there is a probability that, absent the error, the sentencer would have concluded that a death sentence was not appropriate.

Sawyer's proposed definition suffers from the same infirmity as the definitions of the Ninth Circuit in *Deutscher v. Whitley*, 1991 WL 204454 (9th Cir. [Nev.]), and the Eighth Circuit in *Stokes v. Armontrout*, 893 F.2d 152 (8th Cir. 1989). Both Circuits require that the petitioner demonstrate constitutional error at the penalty phase which probably resulted in a verdict of death against one whom the jury (sentencer) would otherwise have sentenced to life imprisonment. *Stokes*, 893 F.2d at 156. This definition invades the discretionary area of the sentencer where it evaluates the mitigating and aggravating circumstances. Since there is no correct outcome in sentencing, even in death sentencing, applying the concept of "actual innocence" to the sentencing phase under the Eighth's and Ninth's definitions, as well as Sawyer's, is an anamorphosis. These proposed definitions require a re-weighing of the evidence from the penalty phase by a federal reviewing court, a proportionality procedure reserved for the highest court in the state. However, the standard adopted by the Courts in *Stokes* and *Deutscher* and now proposed by Sawyer constitutes nothing more than an attempt to incorporate the standard proffered in the dissent and rejected by the Court in *Smith v. Murray, supra*, into the abuse of the writ exception for capital sentencing. However, this standard, in effect, merely a restatement of prejudice, is no more valid now than it was when this Court rejected it in 1986. Moreover, this suggested standard will do real violence to the notions of finality of state court judgments and comity. Due to the speculative nature of federal review of state discretionary decisions far removed in time and position, it will not even assure a death sentence free of serious error. Rather, it would simply encourage late litigation or relitigation of factual matters, diminishing the validity and the reliability of the fact-finding process. *See, McCleskey v. Zant*, ____ U.S. ____ at *Reed v. Ross*, 468 U.S. 1, 13 (1984).

As noted earlier, the States enacted a series of differing statutes in response to the Court's Eighth Amendment cases. Some statutes require a strict balancing of factors in aggravation and mitigation, *Blystone v. Pennsylvania*, 494 U.S. ____, 110 S. Ct.

1078 (1990), others do not. *Zant v. Stephens, supra.* Of necessity, the habeas court, if it is to employ the test proposed by Sawyer, must look to the particular State statute and attempt to re-weigh the evidence in accordance with the state court procedure, an activity federal courts ought not do. In effect, the federal court would be applying state sentencing law to the federal judge's own independent view of the evidence. This federal consideration of the propriety of the sentence raises the danger of violating the state court's authority as final arbiters of state law. *Wainwright v. Goode*, 464 U.S. 78 (1985); *Spaziano v. Florida*, 468 U.S. 447 (1984). As such, it constitutes a significant affront to notions of comity. The federal courts would be required to "peer Majestically" over the shoulders of state sentencers to see if they would sentence the prisoner in the same way given the new claim concerning sentencing evidence. Such a result is contrary to the holding of *Lewis v. Jeffers*, 497 U.S. ____, 110 S. Ct. 3092 (1990).

Likewise, this standard would significantly undermine any notion of finality in the state court judgment in a capital case by making all sentencing issues subject to perpetual reargument. Litigants would be entitled, notwithstanding a failure to prove cause for the successive petition, to relitigate in a new round of federal habeas review any time they are able to hire a new, "friendly" expert, or whenever a new issue or psychological diagnosis gains favor. Virtually any legal or factual claim can be linked to the "propriety" of a habeas petitioner's sentence. Indeed, Sawyer's basic request is for this Court to adopt a standard which would permit federal re-sentencing in successive habeas, on a periodic basis to see if "death" is still an appropriate sentence according to a new federal judge, based on alleged newly procured mitigating evidence or a re-constituted claim.

An adoption of Sawyer's definition would do violence to the abuse of the writ standards just announced in *McCleskey v. Zant*. *McCleskey* limited the ability of a defendant to engage in endless rounds of habeas corpus litigation which are now the norm, rather than the exception in capital litigation. *See Woodard v. Hutchins*,

464 U.S. 377 (1984). By proposing what is, in effect, a pure prejudice standard for the fundamental miscarriage of justice exception to the abuse of the writ doctrine, Sawyer requests that this Court, after requiring a petitioner to show "cause" as well as "prejudice" in order to litigate a successive petition, erase the cause requirement. Thus, an adoption of Sawyer's proposed standard has the practical effect of abolishing the distinction between the first and subsequent habeas petitions. It will cause the exception to the 9(b) prohibition to hearing successive petitions to be the rule in the context of capital sentencing errors.

For all of the violence this standard would cause to concepts of finality, comity, and the abuse of the writ doctrine, it will not improve the reliability of the sentencing process in a capital case. Sawyer's definition permits federal re-weighing of evidence in a successive federal petition. To date this has been a matter carefully limited to state appellate courts. *Clemons v. Mississippi*, ___ U.S. ___, 110 S. Ct. 1441 (1990). *Many state* appellate courts have been very leery of re-weighing the sentencing evidence due to the perceived inability to determine accurately how the fact finder would have valued the evidence it heard and saw. *See State v. Lloyd*, 329 N.C. 662, 668, 409 S.E. 2d 218, 222 (1991).

The federal habeas court is far removed in time and position from the state sentencer who heard the evidence and observed the demeanor of the witnesses as well as the prisoner. This first hand observation of the factors which are not always made part of the printed record nevertheless goes into the making of the reasoned moral inquiry upon which a capital sentence is based. To permit the federal courts, years after the fact, to review the discretionary decisions of the state sentencer to determine if they are still "correct" undermines significantly the role of the state sentencer.

The accuracy of any such re-weighing is questionable. The accuracy of the fact-finding concerning the proffered claim on a successive habeas petition likewise is questionable. This Court noted in *McCleskey* that determinations of claims made years after

the event are subject to an erosion of reliability. The Court commented on the obvious proposition that fact finding processes are impaired when delayed.

Thus, because the standard suggested by Sawyer focuses on how the fact finder might have reacted to evidence during its discretionary determination of the sentence and not on the factual innocence of the defendant, that is, his total inability to be subjected to the sentence, the standard substitutes "prejudice" for "innocence" as the basis to permit merits review of successive habeas litigation. Such a definition would be a reversal of this Court's jurisprudence in the area of abuse of the writ and would seriously undermine this Court's concern for comity and finality.

This Court should reject Sawyer's proposed standard as well as that formulated by the Eighth and Ninth Circuits so that this Court's habeas jurisprudence will not be undercut by a standard for actual innocence of the death penalty which would swallow the rule prohibiting successive habeas review in the all encompassing exception to 9(b) in the area of capital sentencing claims.

D. The Fifth Circuit Definition Could Be Limited To Include A Showing That The Prisoner Is Actually Innocent Of The Underlying Crime That Makes Him Eligible For The Death Penalty.

The Fifth Circuit translated *Kuhlmann's* guilt-innocence phase test to the sentencing phase by requiring that the petitioner show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of facts would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty. *Sawyer v. Whitley*, 945 Fed. 2d 812 (5th Cir. 1991). The core of the Fifth Circuit standard is that, after looking at all of the evidence that was and arguably should have been presented, the jury would not have been authorized to sentence him to death, *Sawyer* at 387.

The Fifth Circuit based its reasoning on the distinction that this Court has made between regular sentencing and death sentencing. It has been held that in order to comply with the Eighth Amendment a death sentence must be imposed under a structure that specifically narrows the circumstances under which it may be imposed. The court recognized in *Bullington v. Missouri,* 451 U.S. 430 (1981), the similarity between a trial on guilt or innocence and a capital sentencing proceeding as it exists in many states. It even afforded double jeopardy clause protection to one acquitted of a death penalty. *Id.* at 446.

The distinction between the two phases of a capital trial are that the guilt phase deals with objective truth which can be discovered and the sentencing phase only provides limited standards for the validity of a sentencing decision. There is no objective measure by which the sentencer's decision can be deemed correct or erroneous if it is made within the authority conferred by the legislature. *Bullington,* 451 U.S., at 444. The Fifth Circuit used the similarities to translate actual innocence into the sentencing phase and the difference is to inform the manner in which it be reviewed. The court concluded that the challenge must be to the fact which established the jury's authority to impose the death penalty. Assessing whether or not someone is actually innocent of the death penalty can only involve the assessment of whether or not the person is innocent of the crime of which he was convicted, which authorizes the imposition of death.

The broader definition, that the petitioner herein suggests, violates the core concern of *Jackson v. Virginia*[5] which was developed to insulate the discretionary function of the jury from judicial scrutiny. Thus, even in reviewing the penalty phase of a capital trial, the review should be limited to factual issues which permit the consideration of the penalty and not the discretionary part used by the fact finder to determine an appropriate sentence.

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5. *Jackson v. Virginia,* 443 U.S. 307 (1979).

The Fifth Circuit's definition could be altered to accommodate the states various schemes to include a requirement that the petitioner show that he is actually innocent of the underlying crime that makes him eligible for the death penalty. It required that the new evidence reviewed in relation to the records evidence must call into question the existence of each and every one of the aggravating circumstances found by the jury when it originally imposed the death penalty. Altering the Fifth Circuit definition to include actual innocence of the underlying crime covers those states that do not narrow the class of persons eligible for the death penalty at the definitional stage. This definition then is the most objective and follows the mandate of *Jackson v. Virginia, supra.* It avoids violating the discretionary part of the sentencing procedure by mandating the reviewing court to analyze only objective factors.

II.

WHEN REVIEWING A DEATH SENTENCE CLAIM FOR AN ABUSE OF THE WRIT UNDER THE "FUNDAMENTAL MISCARRIAGE OF JUSTICE" EXCEPTION ONLY CLAIMS THAT SHOW, BASED ON THE EVIDENCE PROFFERED PLUS ALL RECORD EVIDENCE, A FAIR PROBABILITY THAT A RATIONAL TRIER OF FACT WOULD HAVE ENTERTAINED A REASONABLE DOUBT AS TO THE EXISTENCE OF THOSE FACTS WHICH ARE PREREQUISITES UNDER STATE OR FEDERAL LAW FOR THE IMPOSITION OF THE DEATH PENALTY MAY BE REVIEWED ON THE MERITS.

A. Petitioner's Claim Is Barred Under Rule 9(b) Because It Was Addressed And Rejected By The State Courts And The Federal Courts In Sawyer's First Applications Thereto; And Because The Factual Bases For The Claim, Were Omitted From His First Writ To The Federal Courts.

Sawyer's second federal habeas petition includes mixed claims: 1. ineffective assistance of counsel as a successive claim and 2.

a *Brady* claim regarding exculpatory evidence in violation of Sawyer's Sixth, Eighth, and Fourteenth Amendment rights, a new claim. The state continues to oppose the consideration of the claims herein as an abuse of the writ under 28 U.S.C.A. § 2254 9(b) and *McCleskey v. Zant*, ____U.S.____, 111 S. Ct. 1454 (1991).

In his first claim, Sawyer alleges that he was denied effective assistance of counsel and an opportunity for a meaningful and individualized sentencing determination because trial counsel failed to investigate mitigating evidence and to obtain expert mental health testimony which he should have presented at the sentencing phase in mitigation of the death penalty. Petitioner's claim herein and the facts that support that claim were essentially reviewed and denied by the Louisiana Supreme Court on direct appeal as Claim I, II and IV, and its sentencing review under Supreme Court, Rule 12. *State v. Sawyer*, 422 So. 2d 95 (La. 1982), *reh. denied* (November 24, 1982). More developed issues were presented to the State District in the first post-conviction application as Claim II, X, XI, XIV, XV, XVI, XVIII and XXII by two new post-conviction attorneys. A review of petitioner's claims presented to the Federal District Court in his first writ of habeas corpus reveals that he presented this claim and the facts supporting it as Claim III, ineffective assistance of counsel, and Claims X-XVIII.

On appeal in the United States Fifth Circuit, Sawyer trimmed the writ to three claims which included ineffective assistance of counsel. One of the basis was a failure to prepare a competent penalty phase. The Fifth Circuit en banc denied this claim on the merits: "Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we, after a thorough review of the record, can find none" (JA 255-256).

When a petitioner raises a claim that a federal court has already considered in a previous habeas corpus petition this Court

may review the merits of the successive claim only when the prisoner supplements his constitutional claim with a colorable showing of actual innocense. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). On the facts presented on the first claim Sawyer fails to so show.

Sawyer's second claim is procedurally defaulted because he never presented the factual basis for the *Brady* claim to the state courts nor to the federal courts on prior writs. He presents four bases for the *Brady* claim which include alleged exculpatory evidence that was suppressed by officials. Because Sawyer has presented no cause and prejudice in order to excuse his procedural default he can only address the merits of this claim if he shows that it will be a fundamental miscarriage of justice for the court to fail to review the issues. *McCleskey v. Zant, supra.*

B. Petitioner Fails To Establish Cause and Prejudice In Order To Excuse The Procedural Default.

The cause standard requires that the petitioner show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court. *Murray v. Carrier*, 477 U.S. 527 (1986). The court in *McCleskey* applied the definition of objective factors that constitute cause to address a claim in a procedural default case to claims in an abuse of a writ case: interference by officials, the factual or legal basis for a claim was not reasonably available to counsel, and ineffective assistance of counsel. Because petitioner has not alleged as cause that the factual or legal basis was not reasonably available to counsel this criteria will not be addressed here.

1. Interference By Officials.

Sawyer claims that interference by officials prevented him from obtaining exculpatory evidence favorable to the defendant.

1. An alleged immunity agreement with Cynthia Shano Schoennagel; 2. The alleged statement from Wayne Shano, the four year old son of Cynthia Shano; and 3. The discovery of another can of lighter fluid near the house was found the day

after the crime was committed. The Fifth Circuit determined that Sawyer failed to support these allegations and rejected them in *Sawyer v. Whitley, supra.*

The State gave open file discovery to the defense counsel as can be seen by the transcript of the discovery motion (JA 347) and from the affidavit of William Charles Credo, the attorney who handled this case on for the state on post-conviction relief (App. F at 13sa). As the Fifth Circuit said, there is no evidence that the state obstructed Sawyer's counsel from deposing these witnesses either at the time of his criminal trial or his first habeas petition. Petitioner's affiants were all available and continued to be available from before trial through the first federal habeas petition. There is no assertion that there was any external obstacle that barred his access to this information. Therefore, petitioner has failed to establish cause based on interference by officials. *See, Amadeo v. Zant*, 486 U.S. 214 (1988).

2. Ineffective Assistance Of Counsel.

Sawyer claims that the ineffectiveness of his trial counsel prevented him from having an opportunity for a meaningful and individualized sentencing determination because his trial counsel failed to investigate mitigating evidence and to obtain expert mental health testimony and present such in mitigation at the sentencing phase. This ground for relief was specifically raised in his first habeas petition, and the claim was rejected on its merits.

In the analysis for ineffective assistance of counsel, under *Strickland v. Washington,* 466 U.S. 668 (1984), the defendant must demonstrate a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. *Strickland* requires that the defendant affirmatively prove prejudice. *Id.* Sawyer in this instance fails to demonstrate prejudice by the lack of specific information regarding his hospitalization in 1966: in how that information would have affected the outcome at trial. In fact, Sawyer initially admitted to the pardon board that he became a certified river boat pilot

by passing the coast guard exam. In a second pardon hearing, he retracted that statement claiming that "he didn't understand the question." Throughout the transcript there is evidence that he worked on the river off and on during the intervening years until the 1979 crime. Moreover, we have an affidavit from his trial counsel, James Weidner, that indicates that Mr. Weidner saw no evidence of incompetency and clearly he was able to assist counsel (App. A at 1sa). Sawyer testified at the penalty phase at which time the jury had the opportunity to view his demeanor, his presentation and evaluate from external characteristic, his abilities. He never denied participating in the crime but admitted to intoxication, only remembering "bits and pieces."

The jury had information regarding Sawyer's prior behavior, his low intelligence, his personality disorder, whether accurate or not, his institutionalization, shock treatments and an abusive childhood. Petitioner clearly fails to demonstrate how the result of the proceeding would have been different by the failure to produce evidence of his prior commitments, drug medication, and alleged mental defect.

Mr. Weidner, trial counsel, clearly presented a defense of toxic psychosis based on intoxication. Both Dr. DeVilla and Dr. Arneson testified at trial for the defendant and supported this defense. Sawyer admitted at the penalty phase that he did not remember the events because he was intoxicated (JA 525). Mr. Weidner urged and developed an intoxication defense at both the guilt and penalty phases of the trial. Because it was unsuccessful does not provide cause for ineffective assistance of counsel.

In regard to the alleged failure to uncover additional medical evidence to present as mitigating evidence, Magistrate Ronald A. Fonseca aptly stated in his finding and recommendation at the District Court level:

> "Petitioner does not furnish us medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization. The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses during the penalty phase of the trial" (JA 113).

Magistrate Fonseca's conclusion (which found that how the jury's decision could have been affected was not demonstrated) was affirmed by the Fifth Circuit panel and the en banc court. This Court affirmed the en banc decision in June, 1990. Since these claims have previously been presented to the State court on post-conviction relief, as well as federal habeas corpus, petitioner's claims are repetitive under Louisiana Code of Criminal Procedure Article 930.4.A. Honorable Judge Tiemann denied petitioner's second application as repetitive on October 5, 1990, and the Louisiana Supreme Court denied his repetitive writ on October 7, 1990.

Because Sawyer cannot demonstrate cause and prejudice for having omitted the claims and facts supporting them, or for more fully developing the claims in his prior writs, he cannot bypass the procedural bar of abuse of the writ unless he demonstrates that a failure to address the merits of the claims would be a fundamental miscarriage of justice.

III.

PETITIONER HAS NOT ESTABLISHED A CONSTITUTIONAL CLAIM WITH A COLORABLE SHOWING OF "ACTUAL INNOCENCE" OF THE DEATH PENALTY UNDER *McCLESKEY v. ZANT* SUCH THAT A "FUNDAMENTAL MISCARRIAGE OF JUSTICE" WOULD

RESULT FROM A FAILURE TO MAINTAIN THE CLAIM.

Petitioner's first claim that his trial counsel failed to investigate mitigating evidence and obtain expert medical health testimony to present at the sentencing phase of his trial qualifies him to be actually innocent of the death penalty does not fulfill the requirements of the Fifth Circuit definition. Under the Fifth Circuit definition the petitioner must demonstrate that he is actually innocent of the death penalty by producing evidence that implicates the validity of the two aggravating circumstances which the jury found in order to impose Sawyer's death sentence. The evidence regarding mental health; brain damage, and childhood facts do not implicate the jury finding that: 1. Sawyer was engaged in the perpetuation of aggravated arson and 2. that the offense was committed in an especially heinous, atrocious and cruel manner. Nor do the facts implicate that Sawyer was actually innocent of first degree murder, La. R.S. 14:30 (Sawyer's brief, Appendix A).

Even under Sawyer's proposed definition this claim must fail because due process only requires petitioner to have access to psychiatric assistance in two instances:

> 1. at the guilt phase of a trial when defendant demonstrates that his sanity at the time of the offense is likely to be a significant factor in determining guilt; and
>
> 2. at the penalty phase when the state presents psychiatric testimony to show an aggravating factor.

See Ake v. Oklahoma, 470 U.S. 65 (1985).

Neither applies here and Sawyer is not entitled to relief. Furthermore, Sawyer is asking this Court to conduct a "psychiatric

medical malpractice review" in a federal habeas proceeding. The Ninth Circuit refused to do such in *Harris v. Vasquez*, 901 F.2d 724 (9th Cir. 1990). The Ninth Circuit also decided that *Ake* was a "new rule" of law which could not be applied retroactively to *Harris* under *Teague v. Lane, supra.* In the instant case, Sawyer's direct appeal became final in 1984. Even if he would be successful on the merits, *Ake* cannot be retroactively applied to Sawyer under *Teague-Penry*.

In *Harris, supra,* the Ninth Circuit further noted that *Harris'* claims rested on a current expert opinion based on pure speculation not probative of the fundamental fairness of this trial or competency of this counsel. As here, the three new expert reports do not give data upon which their conclusions are based that would be probative of the penalty phase or the competency of counsel. Absent is any data regarding Sawyer's behavioral manifestation since the early tests that would indicate dysfunction in mitigation. The affidavits offered here lack credibility because their conclusions are speculative and unsupported by objective evidence in the record.

Because the alleged exculpatory evidence that Sawyer claims the state suppressed does not present specific facts to show that he is innocent either of the murder of Fran Arwood or of both of the valid aggravating circumstances the jury found when it recommended the death penalty, he is not actually innocent of the death penalty.

A. Petitioner's Sentencing Jury Heard An Accurate Profile In Mitigation That Would Not Have Been Changed Substantially By The Additional Alleged "Facts".

A further review of the additional alleged facts and evidence shows that, even under petitioner's definition this evidence is hollow and distorted, and would not provide the kind of doubt in the jury's mind such that there would be a fair probability but for the alleged error the jury would not have imposed the death penalty.

1. Sawyer's Jury Heard That He Was Probably A Sociopathic Personality.

Sawyer claims that the jury heard inaccurate information and that his counsel was ineffective because Dr. Arneson concluded as a psychiatric impression that he was a probable sociopathic personality (JA 343). James Weidner, as trial counsel, had no control over the psychiatric impression of the examining psychiatrist, Dr. Genevieve Arneson. He called Dr. Arneson at trial to support the defense of intoxication.

> "A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim which as described by witnesses, if his behavior as that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, that it would be my opinion that he was, he was psychotic, and it was a toxic psychosis secondary to the alcohol.
>
> Q. Dr., when a person is in a toxic psychosis are they able to form intent? A. No, not in the usual sense." (JA 474-475).

Dr. Arneson's testimony supported his defense of toxic psychosis to mitigate Sawyer's culpability in this crime. It was beyond Mr. Weidner's control that Dr. Arneson gave the psychiatric impression of probable sociopathic personality and that Mr. Boudousque, the prosecutor, cross-examined Dr. Arneson on this point. Nevertheless, the psychiatric impression of "probably sociopathic personality" may be an accurate diagnosis of Mr. Sawyer at that time in his life.

Sociopathic personality is found in the DSM-III-R under § 301.70 Antisocial Personality Disorder. The essential feature of this disorder is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood. The childhood signs are typically lying, stealing, truancy, vandalism, initiating fights, running away from home

and physical cruelty. In adulthood, the antisocial pattern continues and may include failure to honor financial obligations, to function as a responsible parent or to plan ahead, and an inability to sustain consistent work behavior. These people fail to conform to social norms and repeatedly perform antisocial acts that are grounds for arrest, such as destroying property, harassing others, stealing and having illegal occupation. They tend to be irritable and aggressive and to get repeatedly into physical fights and assaults including spouse-or child-beating. They generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others.

The DSM-III-R continues by pointing out that after the age of 30 the more flagrantly antisocial behavior may diminish, particularly sexual promiscuity, fighting and criminality. In regard to impairment, it lists that the disorder can result in failure to become an independent, self supporting adult giving rise to many years of institutionalization, more commonly penal than medical.

These criteria for antisocial personality disorder (sociopathic personality) (App. A at 1sa - Dr. William S. Weidorn, M.D.) clearly describe the accounts of Robert Sawyer and his early childhood and adolescent life. It also supports Dr. Arneson's psychiatric impression of probable sociopathic personality and would diminish the claim here that the jury heard an inaccurate or misleading characterization of Sawyer. Noteworthy is that Mr. Sawyer was about 40 years old when the current psychiatric evaluations were done and Dr. Arneson's evaluation was done about 11 years ago at which time Sawyer would have been about 29. According to the DSM-III-R this antisocial behavior may have diminished in the 11 year span between the evaluations.

Clearly, one danger in relying on new psychiatric evaluations in order to determine facts from 10 to 12 years prior is that mental conditions and personalities can change in that time span, especially if the person has been in a controlled environment such as a penal or mental institution. For this Court to rely on the most recent psychiatric evaluations to determine Mr. Sawyer's condition 11

years ago would do a grave injustice to the criminal justice system and the psychiatric evaluations at that time. Buying into a distortion of the record by giving credibility to the newest psychiatric evaluations will offend the principals of comity and finality of state criminal convictions and encourage bogus successive petitions such as this.

2. The Jury Heard The Essential Elements And Consequences Of Organic Brain Damage And Mental Retardation.

After presenting prior and recent mental health evaluations, petitioner points to the fact that only Dr. Arneson diagnosed him as being a sociopath. This fact is understandable because, according to the DSM-III-R, as previously stated Sawyer's symptoms probably diminshed in the past 10 years. The prior evaluations and treatment were done in 1965 and 1966 when petitioner was 14 and 15 years old. The current evaluations were done in 1990 when petitioner was 39 years old. Thus, it is not surprising that there is no other diagnosis of sociopathic personality except that which Dr. Arneson's performed when Sawyer was 29.

Moreover, as pointed out in the affidavit of William S. Weidorn, M.D. (App. B at 2sa), the sentencing jury heard the essentials of the diagnosis from Sawyer's teen years. There is no medical data to support the conclusions in the 1990 reports, as noted by Dr. Weidorn's affidavit. An abnormal EEG is not unusual and, in fact, Mr. Sawyer's most recent EEG was labeled normal. The description of Sawyer's hospital stay during his teen years is consistent with the description of sociopathic personality as given by Dr. Arneson at the guilt-innocence phase of Sawyer's trial (JA 478-481).

The second diagnosis came from the sanity board hearing at the time of Sawyer's trial in 1980. As Dr. Weidorn points out, the sanity board devoted themselves to following the mandate of the court: to assess whether or not Sawyer was competent to stand trial and whether or not he was competent to understand the charges against him and assist his attorney. Both psychiatrists concluded that Sawyer was competent to stand trial.

The third set of evaluations occurred in 1990, when Dr. Alec Whyte concluded that Sawyer was suffering from organic personality syndrome and mental retardation. But a review of the definition of organic personality syndrome in the DSM-III-R indicates that one can also interpret the data upon which he bases his conclusions as being suggestive of antisocial personality or of no psychiatric disease present (*See* App. B at 2sa). Dr. Whyte's affidavit is merely speculative and conclusory in nature and does not give any reason to distinguish why Sawyer suffers from organic personality syndrome as opposed to antisocial personality disorder as opposed to just plain meanness.

Moreover, Sawyer's I.Q. has measured anywhere from 68 to 73 (JA 562) and at this range he is at the highest level of mental retardation. Dr. Whyte also concludes that Sawyer functions at the 4th grade level. Essentially, Sawyer is arguing that the combination of organic personality syndrome and mild mental retardation diminishes his ability to control his impulses, to think in long range terms, and to learn from his mistakes, which affects the degree of culpability to such an extent that he should not have gotten the ultimate penalty of death.

These claims have a familiar ring that this Court has seen in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989). As this Court stated in *Penry* "In light of the diverse capacity and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with a level of culpability associated with the death penalty." *Id.*, 109 S. Ct. at 2957. The court ultimately ruled in *Penry* that a mentally retarded criminal offender with an I.Q. of 54 and a mental age of 6½ years could be sentenced to death, and impliedly, was competent to stand trial and to assist counsel in preparing the appeal of the conviction and sentence.

Furthermore, as the Classification in Mental Retardation points out:

> "The term *mental retardation*, as commonly used today, embraces a heterogeneous population, ranging from totally dependent to nearly independent people. Although all individuals so designated share the common attributes of low intelligence and inadequacies in adaptive behavior, there are marked variations in the degree of deficit manifested and the presence or absence of associated physical handicaps, stigmata, and psychologically disordered states." Classification in Mental Retardation, at 12. *Id.*, 109 S. Ct. at 2957.

The jury heard that he was a slow learner from his sister at the penalty phase. The evidence regarding his lifestyle from his nephew, his sister, and the two psychiatrists indicated that he functioned in society, held jobs, though not necessarily steadily, and was capable of entertaining and babysitting children. Nothing in the record regarding Sawyer's performance throughout the years would support the fact that his retardation would have seriously affected his culpability. Moreover, Sawyer does not offer any evidence of the general behavior of jurors with respect to sentencing mentally retarded defendants, nor of decisions of prosecutors.

As part of the 1990 evaluation, Dr. Orrin Devinsky identified that there exists an abnormality in the left frontal lobe. But in the second paragraph, the Doctor does not give any reason for his jump from an abnormality in the frontal lobe to the conclusion "compromises intellectual, emotional and behavioral functions." (JA 546).

People often suffer brain damage in the frontal lobe area which does not manifest itself in behavioral symptoms. There is no allegation in Dr. Devinsky's new report that Mr. Sawyer has not been able to function in jail, or that he has displayed any behavioral activity to indicate impaired cognitive, intellectual or

emotional function for the past ten years. Without a further factual statement, Dr. Devinsky's conclusion is without a factual basis. Moreover, the last sentence of the second paragraph in his letter is also a conclusion not supported by facts. To the contrary, Mr. Sawyer admitted at the first pardon hearing in October, 1991, that he was a licensed riverboat pilot who had passed a strict licensing test on his fifth try. He acknowledged that the average number of times to take the test before passing was six. It was also acknowledged that the test involved computational abilities which Mr. Sawyer was able to complete on the test. Dr. Whyte who was present at the hearing, admitted that when he did his report on Sawyer's functioning he did not know that he was a licensed riverboat pilot and could find no reasonable explanation to justify his report with that new information. At the second pardon hearing in November, 1991, Sawyer retracted his prior statement regarding a riverboat pilot claiming that he misunderstood the question. Yet if we look at Dr. Arneson's and Dr. DeVillier's reports he told them in 1980, that he worked as a deckhand and as a riverboat pilot. (JA 341, 344).

A review of Dr. Brad Fisher's psychological evaluation leads to the conclusion that it suffers from the same problem that the Fifth Circuit found in reviewing his report in *King v. Lynaugh*, 868 F.2d 1400, 1406 (5th Cir. 1989):

> . . . The state habeas court specifically found that Dr. Fisher's proffered affidavit lacked credibility because its conclusions concerning drug use and lack of rational capacity were extremely speculative and unsupported by objective evidence in the record.

Dr. Fisher relies on Sawyer's self serving account of his life and what happened the night of the crime, as do Doctors Devinsky and Whyte. Fisher makes speculative conclusions about what probably happened the night of the crime. He also reaches into

the realm of Sawyer's ability to differentiate between right and wrong in 1979.

Sawyer's claim herein rests on current expert opinions based on pure speculation as a result of testing and observations done eleven years after the crime. The reports are not probative of the fundamental fairness of Sawyer's trial or sentencing hearing. The conclusions are no more than speculation about Sawyer's mental condition at the time of the crime in 1979.

3. *Sawyer's Jury Heard About His Prior Hospitalization But Had It Heard The Real Reasons For That Hospitalization It Would Not Have Reached A Different Conclusion.*

The sentencing jury heard from Glenda White, Sawyer's sister, that he had been hospitalized. The clinical records give reasons for admission: "On Sunday prior to admission patient allegedly walked in on a lady in an outdoor toilet near a church and tried to choke her. Two years ago patient was accused of attempted rape. In February, 1966, patient continued to run away. His aunt felt that she could no longer control his behavior and she returned him back to Memphis." (JA 538).

The clinical record further states that the patient admitted attacking a 39 year old woman sexually. In the course of staying at the hospital he began to annoy the girls on the hospital grounds for which privileges were removed. He continued to show childish behavior and lack of responsibility and went AWOL on the day his family came to visit. The report clearly states that he does feel that nobody liked him in school, that nobody is interested in him, even though his family visits him very often and apparently are over protective of him. (JA 538-539). The physical diagnosis was that the patient is incompetent. Incompetency removed. Patient is a minor. It further stated that although the patient may adjust temporarily at home under the supervision of his parents who overprotected him he is incapable of competing in the outside world for employment. (JA 540).

Upon discharge from Western State Psychiatric Hospital after

commitment on August 16, 1966, he was labeled "was not competent." (App. J at 21sa) The certificate of his incompetency defines the meaning of "not competent" under Section 33-633, Tennessee Code Annotated. "The superintendent must certify his opinion as to whether the person is or is not competent to conduct his own affairs. In the event the person is competent to conduct his own affairs, the County Court Clerk should present the certificate to the County Judge and the statute is mandatory for the County Judge, without a hearing, to enter an order on the minutes of the county court restoring full legal rights to the person. If, in the opinion of the superintendent, the person is not competent to conduct his own affairs, the certificate should be filed as a record in the case in the office of the County Court Clerk.'

On January 10, 1967, Sawyer was released with this ruling of "not competent" at the age of 16 years old. Thus, his evaluation as not competent relates to his status as a minor and impulsive behavior. This declaration of not competent has no relationship to his mental capacity and none is indicated in the Tennessee records.

4. *Sawyer's Jury Heard A Substantial Amount Of Facts Regarding His Childhood.*

At the penalty phase, the state put on Peter Thomas, Deputy Prosecuting Attorney for the Sixth District of Little Rock, Arkansas, who introduced the indictment, conviction and commitment of Robert Sawyer for involuntary manslaughter of a four year old child in that state. The state then rested and Mr. Weidner put on Glenda White, sister of Robert Sawyer. Ms. White gave 12 pages of direct testimony describing Robert Sawyer's deprived childhood, abuse by his father, his hospitalization in state mental hospitals, shock treatments, forced drug treatment, abusive treatment by the police in his home town, his marriage and birth of his son, the estrangement between Sawyer and his son, and her knowledge of Robert's relationship with Cynthia Shano and her two boys. Ms. White also testified that she allowed

Robert to babysit with her children who loved him. Ms. White emphasized the patience that Robert had with the children as she observed it. After cross examination, Mr. Weidner put on Glen Smith, Sawyer's nephew. He too testified that he never saw Robert Sawyer cruel nor did he ever experience mistreatment at Robert Sawyer's hand. He testified that Sawyer played ball with him and took him to the movies and the park.

Sawyer himself testified and gave his account of the events that night. He never denied doing the crime but simply said he was intoxicated and could only remember bits and pieces. He also briefly described his childhood and his poor relationship with his father. (JA 525-526). Notable, at the second pardon hearing, November 1991, Sawyer recalled more details of that night: The position of Fran Arwood in the tub, how she was carried.

The additional affidavits of family members merely reiterate the story of Sawyer's abusive childhood heard by the jury. Reiteration is not additional mitigation which could have changed the jury's sentence. See *Burger v. Kemp*, 483 U.S. 776 (1987). Additional witnesses before the sentencing jury may not have changed its decision, in fact, sometimes reiteration tends to look staged and false, affirming the appropriateness of the death sentence.

5. *The Evidence Of Alleged Brain Damage, Mental Retardation And Tragic Childhood Are Unreliable And Do Not Go To The Issue Of Actual Innocence Of The Crime.*

The conclusions drawn by the doctors from the tests they ran are so speculative that they could not have made a substantial difference to the jury. Additional detail facts about Sawyer's childhood could hardly have overcome the fact that he brutally beat up a four year old child in Arkansas and was lucky to be convicted of involuntary manslaughter. Moreover, in this case, Sawyer had the key to the front door in his pocket yet made no attempt to get help. (JA 362). Sawyer took the stand and essentially never denied participating in the crime. He admitted that he was intoxicated and claimed to remember only bits and pieces of the

crime. The evidence of brain damage, mental retardation, and tragic childhood do not go to the factual innocence of the crime or of the aggravating circumstances; and do not substantially excuse his default for not presenting this evidence to the court earlier.

Petitioner misleads this Court as to the function of a Louisiana jury at the sentencing phase in regard to evaluating aggravating and mitigating circumstances. The jury at the sentencing hearing is charged to *consider* the aggravating and mitigating circumstances La C.Cr.P. Art 905.3. (App. I at 20sa). The only requirements for the jury to impose the death penalty are to find one of the statutory aggravating circumstances beyond a reasonable doubt and to consider the mitigating evidence. Because Louisiana is *not* a weighing state, any speculation on the effect that the evidence would have had upon the jury is merely speculation and could not go to the actual innocence of Sawyer regarding the crime or the statutory aggravating circumstances. The Louisiana Supreme Court performed a mandatory proportionality review and concluded that the jury's conclusion was not reached arbitrarily. (JA 30).

Initially, Sawyer presented a litany of complaints in support of his ineffective assistance of counsel claim which included counsel Weidner's alleged failure to secure his own expert witnesses in the medical field and his alleged failure to prepare properly the penalty phase at trial. The Fifth Circuit panel, as well as the en banc court, on his first federal habeas petition, concluded that Sawyer had failed to affirmatively demonstrate prejudice from the allegedly deficient actions of counsel and his ineffective assistance of counsel claim must fail. The state trial judge, in his reasons for denying post-conviction relief said that Mr. Weidner's decision in not calling more than three character witnesses was probably a strategy choice in as much as repetition tends to sound insincere. As stated by the Fifth Circuit in *Larsen v. Maggio*, 736 F.2d 215, 217 (5th Cir. 1984).

> "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."

It is a clear principle that petitioner must conduct a reasonable and diligent investigation aimed at all relevant claims and grounds for relief in the first federal habeas petition. This Court clearly stated that "if what petitioner knows or could discover upon reasonable investigation supports a claim for relief in the federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because the evidence discovered later might also have supported or strengthened the claim." *Jones v. Whitley*, 938 F.2d 536 (5th Cir. 1991.)

B. The State Had No Exculpatory Evidence To Suppress.

Wayne Shano, Cynthia's four year old son, was present in the house at the time of the offense. Detective Paul Livaudais interviewed the child the day after the crime. (App. G at 15sa) According to Wayne Joseph Shano, his daddy Bobby (Sawyer) hit that girl with a hammer. He showed Detective Livaudais the bedroom where the victim lay with blood coming from her mouth and face. He said daddy Bobby discarded what he used to burn the victim in the garbage bag. In this garbage bag was found a half a part of a cigarette case, silver in color. There is no documentation that any second lighter fluid can was found. Wayne then stated that this was the item used to burn the victim by his daddy Bobby. (App. G at 15sa).

Clearly, petitioner is relying on the last minute affidavit of a third party, Betty Thibodeaux, who claims that she was at the scene of the interview. The police report does not mention her but merely states that the child's mother Cynthia Shano was present. If a court lends credibility to last minute affidavits by attention seeking people that distort documented facts it encourages perpetration of false accusations.

In regard to the alleged immunity agreement Cynthia Shano denies that she was ever promised anything in exchange for her

testimony (App. D at 8sa); Phillip Boudousque, the prosecutor, also denies ever having even considered Cynthia as a suspect. (App. C at 5sa). Evidence based on hearsay affidavits from memories that are 11 years old should not be acknowledged by this or any other court. Manufacturing an immunity agreement to support a claim for a second writ is unconscionable.

In support of his claims petitioner fabricates an immunity agreement for Cynthia Shano based on hearsay and 11 year old memory. Furthermore, he misleads the court as to Wayne Shano's statements to the police as described in the police report. He also alleges a second can of lighter fluid which has never been mentioned in a prior petition. Instead, petitioner in his second writ to the district court, talked of a silver cigarette case which was found in the trash on the day following the crime. Also, in his writ to the federal district court, he tried to make a *Brady* issue from a letter which was written four months *after* the trial by an inmate acquaintance of Charles Lane to Cynthia Shano. Petitioner in that district court writ fabricated a claim by lifting a statement from the prosecutor's trial notes regarding an odor of alcohol on Shano and omitted notifying the court that the note before that one indicated that at no time was Cynthia Shano considered for prosecution. These "facts" were omitted from petitioner's brief here. His "facts" are not founded in reality but are presented to this Court as a distortion of the facts, based on last minute hearsay affidavits for the purposes of sandbagging and distorting the record. The standard of review proposed by Sawyer would encourage precisely this type of behavior in successive petitions that should be subject to sanctions.

C. Louisiana's Law of Principals.

In Louisiana, under La. R.S. 14:24[6] all persons who aid and

6. *La. R.S. 14:24 (Principals)* - All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

abet in the commission of a crime, whether directly or indirectly, may be charged and convicted with that crime. The doctrine of principals is limited to those crimes for which a person personally has the requisite mental state. In the case of a first degree murder conviction, the requisite mental state is that the defendant had the specific intent to kill or inflict great bodily harm. It is not enough to find merely that the accomplice had the necessary mental state, since this intent cannot be imputed to the accused. *State v. Holmes*, 388 So. 2d 722 (La. 1980).

The Louisiana Supreme Court reviewed Sawyer's conviction and sentence of first degree murder for the sufficiency of evidence under the *Jackson v. Virginia* standards, *supra*. The court determined that despite the testimony of laymen and psychiatrists regarding Sawyer's allegedly intoxicated condition and its effect on his ability to form a specific intent to kill or inflict great bodily harm, the jury reasonably rejected the defense. The court found ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found defendant acted with specific intent, despite his excessive consumption of alcohol. *State v. Sawyer*, 422 So. 2d 95 (La. 1982), *reh. denied* (Nov. 24, 1982). If the alleged "essential facts" that Sawyer claimed the jury should have heard were in fact before the jury, it would not have made a difference such that a sufficiency of evidence review under the *Jackson* standard would not survive. The alleged immunity offer might be introduced as hearsay testimony by witnesses who could only repeat innuendo statements. The testimony of Diane Thibodeaux regarding Wayne Shano's statement to Paul Livaudais would be inadmissible hearsay. The alleged second can of lighter fluid could not be introduced because of the absence of facts to support its existence. The alleged abuse and neglect of Shano's children would not be admissible under relevancy. The alleged acquaintance of Charles Lane and Shano before the crime would have been overbalanced by the testimony of Shano, Thomas Champagne, Jr., and detectives who verified that Charles Lane had just met Robert

Sawyer and Cynthia that night in the lounge.

The evidence of Sawyer's organic personality syndrome with its conclusory statements not based on facts about his inability to form intent were heard through Dr. Arneson's testimony regarding specific intent and Sawyer's testimony. Dr. Arneson was called as a witness by the defense and, in answer to an inquiry regarding Mr. Sawyer's ability to form intent with his alleged degree of intoxicaition, she said, "he could not in the usual sense" (JA 474-475).

After reviewing the evidence that Sawyer wishes to introduce, the problems that he may have introducing the evidence because of lack of factual basis, hearsay and/or relevancy, the conviction and sentence of Robert Sawyer would still survive a *Jackson v. Virginia* sufficiency of evidence review.

Clearly, under Louisiana law, the evidence supported Robert Sawyer's specific intent to commit the crime based on his participation in the crime. The testimony at trial established that Robert Sawyer locked the front door and had possession of the key, that he intimidated Cynthia Shano to go to a bedroom, that he actively participated in the beating, the scalding, the burning, and the torture of Fran Arwood. This participation and failure to prevent the events support his participation in the crime such that a reasonable juror could infer from the circumstances that he had the specific intent necessary for a first degree murder conviction. Likewise, a defendant may be convicted and sentenced to the death penalty for a felony that resulted in a murder when his participation is major and his mental state is one of reckless indifference. *Tison v. Arizona*, 481 U.S. 137 (1987). The testimony in the instant case, even if the alleged essential facts proposed by Sawyer were admitted, would establish at least a reckless indifference which would support a conviction of first degree murder and a sentence of death pursuant to federal constitutional principles.

After reviewing the Louisiana law of principals and the federal jurisprudence under *Tison v. Arizona*, *supra*, it is clear that Robert Sawyer has not produced any alleged facts that could change his participation in the crime enough to eliminate his eligibility for a first degree murder conviction and sentence of death. Thus, Sawyer has failed to establish an actual innocence of the death penalty. The denial of his writ based on an abuse of the writ is not a fundamental miscarriage of justice.

CONCLUSION

After considering the foregoing law and evidence, this Court should affirm the Fifth Circuit's opinion because Sawyer has not shown that he is actually innocent of the death penalty under that definition; nor under any definition because the claims presented here are based on manufactured facts and distortions of the record.

Respectfully submitted,

JOHN M. MAMOULIDES
District Attorney
DOROTHY A. PENDERGAST*
Assistant District Attorney
Attorneys for Respondent

* *Counsel of Record*

APPENDIX A — AFFIDAVIT OF JAMES S. WEIDNER, JR.

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

AFFIDAVIT

Before me, the undersigned Notary Public, came and appeared James S. Weidner, Jr. and after being duly sworn did depose and state:

That he was the lead trial attorney for Robert Sawyer and did represent him at his trial for First Degree Murder. That prior to commencing the trial, Robert Sawyer gave no indication of being unable to proceed to trial. Robert Sawyer answered questions put to him, seemed to understand the nature of the proceeding, acted in an appropriate manner and gave no indication of being mentally unable to proceed with the trial.

s/ James S. Weidner, Jr.
James S. Weidner, Jr.

Sworn to on this 9th
day of October, 1990

s/ Michelle N. Meeks
Notary Public
My Commission Expires (illegible)

APPENDIX B — AFFIDAVIT OF WILLIAM S. WEIDORN, M.D.

PARISH OF JEFFERSON

STATE OF LOUISIANA

AFFIDAVIT OF WILLIAM S. WEIDORN, M.D.

SUMMARY OF REVIEW OF MEDICAL RECORDS AVAILABLE ON ROBERT SAWYER AND OBSERVATIONS OF ROBERT SAWYER AT PARDON BOARD HEARING AT ANGOLA ON OCTOBER 8, 1990

I reviewed the medical records from Robert W. Sawyer's adolescence and hospitalizations in Tennessee. I reviewed the trial transcripts of the testimony of the Sanity Board Hearing members in 1979. And I reviewed the most recent reports of 1990 by the psychiatrist, Dr. Alec Whyte, the neurologist, Dr. Orrin Devinsky and the clinical psychologist, Brad Fisher.

In essence there are three sets of diagnoses: 1) from his adolescence and hospitalization in Tennessee, 2) from the Sanity Board Hearing, 3) the most recent set of reports by the above named consultants. In his teens, he was diagnosed as suffering from schizophrenia, childhood type. This is difficult to substantiate based upon the report of that period because the reports describe his psychological functioning in such a way that schizophrenia would not be present. Further, the most recent psychological test does not show any suggestion of schizophrenia. Therefore, it is difficult to support that diagnosis. Further, during these adolescent hospitalizations, one electroencephalogram was reported as an abnormal EEG. This is a finding and not a diagnosis and in and of itself little can be made of it.

Appendix B

At the time of his trial, one of the psychiatrists raised the question of his being a sociopathic personality (in current diagnostic terminology this is now termed antisocial personality). The Sanity Board at that time devoted themselves to following the mandate of the court, that is, to assess whether or not Sawyer was competent to stand trial and whether or not he was competent to understand the charges against him and assist his attorney. According to their testimony they felt that Sawyer was able to do all of those things.

Finally, the most recent consultants of 1990 reach diagnoses of Organic Personality Syndrome and Mental Retardation. In reviewing the data one can interpret the current data as being possibly suggestive of Organic Personality Syndrome. However, one could also interpret the data as being suggestive of Antisocial Personality, and in addition, one could interpret the data as being sufficient of no psychiatric disease present. Thus, it is difficult to substantiate these formal diagnoses at this point.

The question of whether or not he is mentally retarded is also a diffucult one. Past and current psychological tests would suggest a degree of Mental Retardation. However, Mr. Sawyer's testimony at the Pardon Board Hearing was to the contrary in that he described himself as being a licensed riverboat pilot, he described himself as functioning in this capacity for a number of years, etc.

In reading the various medical documents available on Robert Sawyer, I am not able to find descriptions of abnormal behavior or abnormal psychological functioning which would be sufficiently interfering with his ability to perform in trials, at hearings, etc. Thus, even if any one of the above listed diagnoses were accurate, and it is difficult to assess any degree of accuracy for them at

this time, the question still would remain as to whether or not Robert Sawyer was able to function in his own defense and work with his attorneys in understanding the various procedures that he is involved in at this time.

In reading these reports, I am unable to find any descriptions of such limitations of his functioning regardless of the various diagnoses which have been offered over this man's lifetime.

s/ William S. Weidorn
WILLIAM S. WEIDORN, M.D.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 22ND DAY
OF OCTOBER, 1990.

s/ Dorothy A. Pendergast
NOTARY PUBLIC

APPENDIX C — AFFIDAVIT OF PHILIP J. BOUDOUSQUE

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared, Philip J. Boudousque', who after being duly sworn did depose and state:

I.

That he was the Assistant District Attorney for the Parish of Jefferson, who prosecuted Robert W. Sawyer for the murder of Francis Arwood.

II.

That after the arraignment, the State of Louisiana offered to Robert W. Sawyer, through his attorney of record, Wiley Beevers, an opportunity to plea to the crime of the first degree murder of Ms. Arwood and receive a mandatory life sentence without benefit of probation, parole or suspension of sentence.

III.

The offer made to Mr. Sawyer through his attorney was made only once and then for a period of limited duration, i.e., the amount of time it took for Mr. Beevers to convey the offer to Mr. Sawyer, thoroughly discuss the plea with his client and return with an answer to the District Attorneys Office.

IV.

Appendix C

That Robert W. Sawyer was only offered a plea to first degree murder with a mandatory life sentence without benefit of probation, parole or suspension of sentence because of the state's concern as to whether there was a legal basis to warrant a finding that Mr. Sawyer was engaged in an enumerated felony pursuant to La.C.C. Art. 14:30 during the course of the murder.

V.

That the District Attorney's Office for the Parish of Jefferson considered Robert W. Sawyer to be the primary instigator and the most culpable participant in the Arwood murder.

VI.

That when Robert W. Sawyer declined to plea to a mandatory life sentence without benefit of probation, parole or suspension, the state never again considered a life sentence.

VII.

That at the time the above stated offer was made and subsequently rejected, the trial court had not severed the trials of Robert W. Sawyer and Charles Lane.

VIII.

That Sawyer's decision obviated the need to make a similar offer to Charles Lane.

IX.

To affiant's knowledge, information and belief, Cynthia

Appendix C

Shano was always a cooperative witness on behalf of the state and that at no time did a representative of the District Attorney's Office ever put pressure on Ms. Shano regarding her testimony.

X.

That the affiant, as an Assistant District Attorney for the Parish of Jefferson, never considered bringing charges to a Grand Jury against Cynthia Shano regarding the Arwood murder.

s/ Philip J. Boudousque
PHILIP J. BOUDOUSQUE

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 15TH DAY
OF NOVEMBER, 1989.

s/ J. William Starr
NOTARY PUBLIC

APPENDIX D — AFFIDAVIT OF CYNTHIA SCHOENNAGEL

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

Before me, the undersigned authority, personally came and appeared:

CYNTHIA SCHOENNAGEL

a person of the full age of majority, who first being duly sworn did state that:

1. Prior to October 10, 1990, and since that time Nicholas Trenticosta, Sarah (last name unknown) and another female have been coming to her residence and insisting that she change her testimony in the case against Robert Sawyer, in particular to state that she had made a deal with the District Attorney's Office to avoid prosecution.

2. They have been to her residence on several occasions, often when her husband was not at home.

3. She has spoken with them on at least seven occasions and on many occasions have seen them outside of her residence and pretended not to be home.

4. On at least one occasion they have walked into her home without knocking.

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5. On more than one occasion she has asked them to quit coming around her house and to quit harassing her to no avail.

6. On Wednesday, October 31, 1990, their last visit to her home they accused her of lying and told her she was being watched. The visit turned into a shouting match on her front porch causing the neighbors to come out to see what was going on.

7. As of this date there is a white car in front of her home which leaves each time she comes out. This vehicle has been in the neighborhood since the visits from Robert Sawyer's attorneys started.

8. She was never charged in connection with the murder of Francis Arwood and never cut a deal with the District Attorney's Office to avoid prosecution therewith.

9. She is currently under treatment for a heart condition, and taking medication. The harassment by these individuals is hazardous to her health.

s/ Cynthia Schoennagel
Cynthia Schoennagel

SWORN TO AND SUBSCRIBED BEFORE ME,
NOTARY PUBLIC, FOR AND IN THE
PARISH OF JEFFERSON, THIS 15TH DAY
OF November, 1990

s/ R. Steib, Jr.
NOTARY

APPENDIX E — AFFIDAVIT OF PAUL E. LIVAUDAIS

AFFIDAVIT

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

PAUL E. LIVAUDAIS

who, after being duly sworn did depose and stated:

He is and has been a police officer with the City of Gretna since May 31, 1975.

He was so employed by the City of Gretna as a police detective on September 28, 1979 and was called on to investigate an aggravated battery and burning of a 23 year-old white female at 928 Porter Street, Gretna.

The investigation was begun on September 28, 1979, and was being conducted by affiant.

On September 29, 1979, affiant telephoned Cynthia Shano, mother of Wayne Joseph Shano, who was four years of age.

Mrs. Shano stated to affiant that her son, Wayne Joseph, was present throughout the beating and burning of the victim and could tell me what actually occurred.

I met with Cynthia Shano and her son Wayne Joseph Shano at 928 Porter Street, Gretna, Louisiana on September 29, 1979.

When this officer arrived, I briefly spoke to the mother, Cynthia Shano, then spoke to Wayne Joseph Shano. Wayne Joseph was calm and very readily stated to me that "my daddy, (Bobby) hit that girl with a hammer." I asked Wayne Joseph where was his daddy when his daddy hit the girl with the hammer and Wayne Joseph immediately led me to the northeast bedroom of the residence and showed me a blood stain where according to Wayne Joseph his daddy Bobby hit the girl with the hammer and the blood had come from the girl's mouth and face.

I then asked Wayne Joseph if he saw anything else and Wayne Joseph told me that his daddy (Bobby), threw what he used to burn the girl away in the garbage bag. I was then led by Wayne Joseph to a garbage bag located in the southwest corner of the residence. This bag was full of garbage so I took the bag out to the front lawn and emptied its contents. Upon the contents falling to the ground Wayne Joseph pointed to an aluminum half of a cigarette case and stated to me that this item was used by his daddy Bobby to pour lighter fluid on the girl's body and burn her.

I then had the necessary evidence collected and left the residence.

At no time during the questioning of Wayne Joseph did Wayne Joseph implicate Mr. Lane in the beating and burning of the victim. Wayne Joseph referred to his "daddy Bobby" throughout the interview, but never was Mr. Lane mentioned. Wayne Joseph at no time told me that his daddy tried to stop Lane but only implicated his daddy Bobby (Robert Sawyer) as being the only person who beat and burned the victim Francis Arwood throughout the ordeal.

Appendix E

s/ Paul E. Livaudais
PAUL E. LIVAUDAIS

Sworn To And Subscribed
Before Me this 27th
day of November, 1990.

s/ Dorothy A. Pendergast
NOTARY PUBLIC

APPENDIX F — AFFIDAVIT OF WILLIAM C. CREDO, III

AFFIDAVIT

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

WILLIAM C. CREDO, III

who, after being duly sworn did depose and state:

THAT, he was the Assistant District Attorney assigned to the original habeas writ application filed by Petitioner Robert Sawyer.

THAT, in conjunction with the original state habeas proceeding, Petitioner Robert Sawyer was represented by Catherine Hancock and Elizabeth Cole.

THAT, to the best of his memory, both Ms. Hancock and Ms. Cole had open file discovery which included a full review by them of the police reports involved in the original trial of Robert Sawyer.

THAT, to the best of his knowledge, after reviewing the file in this matter, the above statements are true and correct.

s/ William C. Credo, III
WILLIAM C. CREDO, III

Appendix F

Sworn To And Subscribed
Before Me this 26th
day of November, 1990

s/ Dorothy A. Pendergast
NOTARY PUBLIC

APPENDIX G — POLICE REPORT BY PAUL LIVAUDAIS RE: WAYNE SHANO

GRETNA POLICE DEPT.

SUPPLEMENT REPORT

Complainant, Drivers, Victim or Arrestee:
Arwood, Francis

Arrest no:
N/A

Complaint no:
9-16496-79

Address of Occurance:
928 Porter Street, Gretna, La.

Original Date of Occurance:
9-28-79

Date of Supplement:
10/3/79

Address of Property Loss:
N/A

Page no:
9

Correct offense or incident classification:
N/A

Appendix G

Official, Change or incident or original report:
RS 14:27/30 Attempt Murder

Value of property recovered:
N/A

Item No.:
14

living room and kitchen. The victim was then taken from the floor put on the bed in the living room, where lighted fluid was poured on her breast and down the front of her nude body and set afire.

On Saturday the 29th day of September 1979 the undersigned officer was contacted by Cynthia Shano of 918 Porter Street, Gretna, La. Cynthia Shano stated to the undersigned officer that her four year old son Wayne Joseph was present through the whole incident that had occurred on 9-28-79, and could tell the undersigned officer what had occurred in his presence [sic]. The undersigned officer then met with Cynthia Shano and her four year old son Wayne Joseph Shano at approximately 4:00 P.M. at 918 Porter Street, Gretna, La. It was learned at this time that Wayne Joseph Shano's DOB was 2-15-76. The undersigned officer then questioned Wayne Joseph Shano in the presence [sic] of Cynthia Shano. According to Wayne Joseph Shano his Daddy Bobby hit that girl with a hammer. The undersigned officer then asked Wayne Joseph Shano to show the undersigned officer the location that the victim was when he observed his Daddy Bobby hit the girl with a hammer. Wayne Joseph Shano then led the undersigned officer to the North East bedroom and pointed to the bed and stated that blood was coming from the victim's mouth and face. (Note: A sample stain was taken from the mattress of this same bed and is listed as Exhibit #5). It was further learned

Appendix G

from Wayne Joseph Shano that his daddy Bobby discarded what he used to burn the victim, in the garbage bag. The undersigned officer was then led to the utility room which is located at the South West corner of the residence and was shown a filled garbage bag. The undersigned officer then removed the garbage bag to the front lawn and emptied the contents. While separating the contents the undersigned officer was shown by Wayne Joseph Shano a 1/2 part of a cigarette case, silver in color. Wayne Joseph Shano stated to the undersigned officer that this was the item used to burn the victim by his Daddy, Bobby. The undersigned officer was then shown a pair of green ladies panties by Cynthia Shano. Cynthia Shano stated to the undersigned officer that the green panties were the same panties worn by the victim prior to the victim taking a bath. It was also learned from Cynthia Shano that a third party may have been at the residence when the victim was beaten, scalded and burned. Cynthia Shano stated that it may be that the victim's X husband Jack Arwood was present. It was further learned from Cynthia S[illegible]hat the two Robert Sawyer and Charles Lane talked about ta[illegible]he victim to Slidell La. and finishing her off.

After finding additional evidence at the scene the undersigned officer called for a B of I Unit. At approximately 4:51 P.M. Officer D. Deauzat of the Jefferson Parish Sheriffs Office arrived. Officer Deauzat took the necessary photographs and collected the evidence for processing. The B of I Unit left the scene at approximately 5:05 P.M.

The undersigned officer secured and left the scene at approximately 5:10 P.M.

Reporting Officer:
Det. P.E. Livaudais

APPENDIX H — LETTER FROM INMATE

1-27-81

Hi Cindy

I am just writing a few lines [sic] to say hello, and I hope by the time this letter get to you it will find you in the very best of health.

Just in case you are wondering how I got your address it is from a guy name Charles Lane he said you was a wonderful friend of his and you like to write to people [sic].

I am 5'8" weigh 132½ lb. I got black hair and brown eyes and 29 years old my name is William Rausch and I like to meet new people [sic] and I like to make new friends.

Charles told me that you have two boys and they name is Wayne and Troy please mail me a picture of all three of you for I can see who I am writing to.

He also said that you look like a girl [sic] name April the one on TV. and believe me she's a fox.

Charles told me yesterday that he was getting out soon and you and him was going back together soon. He always talk about you all the time he don't know I am writing this letter because I am in my cell.

Cindy I don't [sic] mean to come between you and Charles in anyway but I would really enjoy writing to you. Charles said that you really helped him alot in court because he was able to lay alot of what he did on the other guy and that kept him from getting the death penalty [sic] so he owes [sic] you a lot for helping him.

Appendix H

I hope to hear from you real soon because your letters would really [sic] mean alot to me because I don't get too [sic] many letters in here and I hope you can understand that because when you get letters in here time goes alot faster in here and without any letters time drags [sic] along. I hope that this letter don't make you mad because it is just a friendship letter. Well, I am going to let you go because I know that you got a lot to do may God bless you and may God be with you and your family

From a friend
William

P.S. Write me back soon and keep that wonderful smile [sic].

APPENDIX I — LA. C.CR.P. ART. 905.3

Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed. *Added by Acts 1976, No. 694, § 1. Amended by Acts 1985, No. 231, § 1; Acts 1988, No. 779, § 1, aff. July 18, 1988.*

APPENDIX J — RESTORATION OF MENTAL COMPETENCY FROM STATE OF TENNESSEE

REV. AUG. 61

STATE OF TENNESSEE

DEPARTMENT MENTAL HEALTH

RESTORATION OF MENTAL COMPETENCY

TO THE COUNTY COURT CLERK OF SHELBY COUNTY, TENNESSEE

IN RE: Sawyer, Robert Wayne
31-424

CERTIFICATE

In accordance with Section 33-633, Tennessee Code Annotated (Chapter ?), I Edwin M. Levy, M.D., Superintendent of Western State Hospital for the mentally ill at Bolivar, Tennessee, do hereby certify that Robert Wayne Sawyer, of Shelby County, has been a patient at this institution and was discharged as of the 25th day of December, 1966, as a patient from this institution and in my opinion the above named person at the time of discharge was not competent to conduct his own affairs.

Given under my hand at office as Superintendent of said hospital this 10 day of January, 1967.

s/ illegible
Ward Physician

Appendix J

s/ illegible
Superintendent

NOTES: Under Section 33-633, Tennessee Code Annotated, the Superintendent must certify his opinion as to whether the person is or is not competent to conduct his own affairs. In the event the person is competent to conduct his own affairs, the County Court Clerk should present the certificate to the County Judge and the statute is mandatory for the County Judge, without a hearing, to enter an order on the minutes of the County Court restoring full legal rights to the person. If, in the opinion of the Superintendent, the person is not competent to conduct his own affairs, the certificate should be filed as a record in the case in the office of the County Court Clerk.

PRIVILEGED AND CONFIDENTIAL INFORMATION
Federal Regulations Prohibits you from making further disclosure of this information.

Supreme Court, U.S.
FILED
FEB 17 1992
OFFICE OF THE CLERK

No. 91-6382

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

* Nicholas J. Trenticosta
R. Neal Walker
Sarah L. Ottinger
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

Counsel for Petitioner

Of Counsel:

John H. Holdridge
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. THE STATE AND AMICI HAVE MISREPRESENTED SAWYER'S STANDARD.

Both Respondent and the United States consistently attempt to equate Sawyer's miscarriage of justice standard with the standards adopted by the Eighth and Ninth Circuits and with standards rejected by this Court in *Smith v. Murray*, 577 U.S. 527 (1986), and *Dugger v. Adams*, 489 U.S. 401 (1989). United States Brief ("U.S. Br.") 11, 15; Respondent's Brief ("Res. Br.") 9, 22. Respondent and amici argue that, like these other standards, Sawyer's proposed standard: (i) confuses actual innocence with actual prejudice; (ii) dismantles the requirement that a prisoner establish cause to avoid writ abuse; and (iii) will encourage writ abuse.

However, Sawyer's proposed standard clearly is distinct from – and far more rigorous than – the standards adopted by the Eighth and Ninth Circuits and the standards rejected by this Court in *Smith* and *Adams*. More important, whatever may be said about the other standards, Sawyer's standard does *not* confuse actual innocence with actual prejudice, does *not* dismantle the cause requirement, and will *not* encourage writ abuse.

Sawyer's proposed standard was clearly set forth in his brief:

> In sum, a fundamental miscarriage of justice will only arise in an exceptional case under the Court's precedents, since (1) generic errors in constitutional rules of procedure, no matter how inherently prejudicial, do not create miscarriages of justice; (2) constitutionally inadmissible but truthful evidence does not create a miscarriage of justice; (3) only errors which result in (a) the consideration of false evidence or (b) the preclusion of true mitigating evidence create miscarriages of justice; and (4) even then, a miscarriage of justice results only if there is a probability that the jury would not have imposed death.

Petitioner's Brief ("Pet. Br.") 19; *see also id.* 15. In light of Respondent and amici's misrepresentations regarding this

standard, it bears repeating that the standard focuses, not on the accuracy of the sentence, but on the accuracy of the *evidence* upon which the sentence was based. Further, the standard does not look simply at whether the prisoner suffered prejudice. *The standard also requires a showing that the death sentence was based on inaccurate or incomplete evidence.*[1]

A. Petitioner's Factual Inaccuracy Test Does Not Confuse Actual Innocence With Actual Prejudice.

Correctly observing that "[t]he concept of actual innocence is . . . quite distinct from that of actual prejudice," the United States argues: "The Eighth and Ninth Circuits have treated the 'actual innocence' doctrine as coextensive with 'actual prejudice.' Those courts have collapsed the two inquiries into one and eliminated the actual innocence doctrine." U.S. Br. 14. *See also, id.* at 15. Whatever the case may be with respect to the Eighth and Ninth Circuits' standards and the standards rejected by this Court in *Smith* and *Adams*, *Sawyer's standard* clearly is not coextensive with an actual prejudice test. Like the standards announced by this Court in *Kuhlmann v. Wilson*, 477 U.S. at 454, n.17, and *McCleskey v. Zant*, 111 S.Ct. 1454, 1474-1475 (1991), Petitioner's standard has a prejudice requirement. But also like the *Kuhlmann/McCleskey* test, Sawyer's test requires that the Petitioner . . .

[1] The only other standard endorsed by Petitioner was the one advanced by the dissent in *Johnson v. Singletary*, 938 F.2d 1166, 1200 (11th Cir. 1991) (Anderson, J., dissenting) (*en banc*). *See* Pet. Br. 15, n.21, 18, n.26, 47, n.64. Under this test, one may avoid a procedural bar where the error has resulted in a "factually inaccurate sentencing profile" but only where a reviewing court concludes that "the factual inaccuracies were so significant that it is *more likely than not* that the result would have been different." 938 F.2d at 1200. (emphasis in original; footnote omitted). The only significant difference between Petitioner's standard and the *Johnson* dissent's standard is that the latter has a higher prejudice threshold – "more likely than not" as opposed to the "fair probability" standard Petitioner draws from *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986).

"supplement[ ] his constitutional claim with a colorable showing of factual innocence." 477 U.S. at 454. *See also, Murray v. Carrier*, 477 U.S. 478, 496 (1986). Thus, Petitioner's test requires not only a showing that there is a probability that the outcome would have been different *but also a showing that the constitutional error resulted in the admission of false evidence or deprived the sentencer of considering true mitigating evidence crucial to the petitioner's culpability.* Pet. Br. 14. *It is this second requirement that distinguishes a claim of actual innocence from a claim of legal innocence*, as this Court held in *Kuhlmann, Smith*, and *McCleskey*. Furthermore, *it is this second requirement that distinguishes a claim of actual innocence from a mere claim of actual prejudice.*

B. Petitioner's Test Will Not Dismantle The Cause Requirement.

Respondent and the United States argue that the standards of the Eighth and Ninth Circuits (and, by extension, Sawyer's standard), because they are coextensive with an actual prejudice test, serve merely to destroy the requirement that a prisoner establish cause to avoid writ abuse. Res. Br. 24; U.S. Br. 16. This assertion, however, is again predicated upon both Respondent's and the federal government's mischaracterization of Sawyer's standard as being an actual prejudice test. As demonstrated *supra*, Sawyer does *not* propose a "pure prejudice" standard. Rather, Sawyer proposes a standard that requires a prisoner to show both prejudice *and* that the constitutional error resulted in the admission of false evidence or deprived the sentencer of considering true mitigating evidence crucial to the petitioner's culpability. Accordingly, like the standards of *Kuhlmann, Carrier* and *McCleskey*, Sawyer's standard does not serve merely to eliminate the requirement that the prisoner demonstrate cause.

C. Petitioner's Test Will Not Encourage Writ Abuse.

The federal government argues that Sawyer's standard will somehow encourage abuse of the writ. U.S. Br. 17. The

argument is flawed on numerous grounds. First, and most fundamentally, the argument fails to explain why a petitioner with a claim of actual innocence would not file the claim at the first available opportunity. The argument is counter-intuitive. By definition, a claim of actual innocence contains compelling factual allegations, and Petitioner's counsel has a strong incentive to file such a claim at the first available opportunity. To do otherwise would be to gamble with the prisoner's life.

Second, even assuming *arguendo* that the argument is not counter-intuitive, which it is, the implication that Sawyer's standard will result in an extensive number of successive filings is erroneous. As Sawyer demonstrated conclusively in his brief, his standard is limited to the rare and exceptional case by several restrictions, including the requirement that the evidence of innocence must be sufficiently powerful to provide a federal judge with an abiding conviction that the jury would have returned a different sentence if the jury had had all probative evidence before it. Pet. Br. at 17-19.[2]

Third, the argument cannot be reconciled with this Court's decisions in *Carrier* and *McCleskey*. Under *Carrier*, a petitioner who can make out a colorable showing of factual innocence need not, *in theory*, bring a procedurally defaulted claim in his first petition as opposed to, say, his second one. Similarly, under *McCleskey*, a petitioner who can make out a colorable showing of factual innocence need not, *in theory*, bring an abused claim in his second petition as opposed, say, to his third.

Fourth, this case demonstrates that the argument indisputably does not apply to successive claims. Sawyer's initial collateral counsel had every incentive to support the initial ineffective counsel claim with Sawyer's hospital records,

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[2] Moreover, the federal government's argument applies equally to actual-innocence claims that satisfy its eligibility standard. If a petitioner has an incentive to "sandbag" with a claim that satisfies Sawyer's standard, which he clearly does not, then the petitioner has the same incentive with a claim that satisfies any eligibility standard.

which so richly document his serious mental disorders, because the claim would have been far more likely to prevail.[3]

II. UNLIKE THE FIFTH CIRCUIT'S TEST AND THE MORE RADICAL TEST PROMOTED BY RESPONDENT AND THE UNITED STATES, PETITIONER'S STANDARD IS ROOTED IN THIS COURT'S PRECEDENTS.

As Sawyer demonstrated in this brief, his proposed standard is compelled by – and rooted in – precedents of this Court. The standard draws directly from this Court's standard of review for guilt-innocence miscarriage cases and from this Court's standard for assessing the impact of Sixth Amendment error in the capital sentencing context. *See* Pet. Br. 13-19 (citing, *inter alia*, *Kuhlmann; Carrier; McCleskey*; *Strickland v. Washington*, 466 U.S. 688 (1984)).

A. Petitioner's Test Is Compelled By *Kuhlmann* And *Smith*.

In *Kuhlmann*, this Court set forth its most extensive treatment of the miscarriage of justice doctrine and identified the doctrine's historical origins. Although Petitioner exhaustively discussed this treatment in his brief, Pet. Br. 16,

---

[3] The three prisoners who have prevailed in the Fifth Circuit with claims of ineffective penalty phase representation presented mental health claims similar to Sawyer's claim here. *Loyd v. Smith*, 899 F.2d 1416 (5th Cir. 1990) (evidence of organic brain damage, frontal lobe dysfunction not presented; case remanded for hearing on prejudice); *Wilson v. Butler*, 813 F.2d 664 (5th Cir. 1987) (family witness's non-expert observations of prisoner's mental disorder not equivalent to "documented history of severe mental difficulties [I.Q. of 66] and testimony from an expert witness") (remanded for evidentiary hearing); *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986) (evidence of mental retardation not presented).

Respondent and its amici ignore it completely.[4] The essentials are as follows:

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Friendly, [Is Innocence Irrelevant? Collateral Attack On Criminal Judgments, 39 U.Chi.L.Rev. 142, 160 (1970)]. Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts *would have entertained a reasonable doubt of his guilt.*

477 U.S. at 454, n.17.[5]

In *Smith v. Murray*, this Court applied the actual innocence concept to the capital sentencing context. This Court rejected petitioner's contention that his death sentence was a fundamental miscarriage of justice because:

> In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.

477 U.S. at 538. It is clear that Sawyer's standard is compelled by this Court's decisions in *Kuhlmann*, *Carrier*, *McCleskey*, and *Smith*. Under Sawyer's standard, a prisoner must show a fair probability that, in light of all the probative evidence, including any mitigating evidence not admitted at

---

[4] Respondent and its amici cite *Carrier* as representing the origin of the actual innocence doctrine (Res. Br. 13; U.S. Br. 9), erroneously maintaining that "[t]his exception has never been given a more precise definition by this Court." Criminal Justice Legal Foundation Brief ("CJLF Br.") 7.

[5] Thus, under *Kuhlmann*, "[t]he prisoner may make the requisite showing by establishing that *under the probative evidence* he has a colorable claim of factual innocence." *Id.* at 454 (emphasis added).

trial and excluding any false aggravating evidence wrongly admitted at trial, the trier of fact would not have imposed death.

III. THE FIFTH CIRCUIT'S TEST AND THE MORE RADICAL TEST PROMOTED BY RESPONDENT REJECT THIS COURT'S JURISPRUDENCE REGARDING THE ACTUAL INNOCENCE DOCTRINE.

In place of Petitioner's standard, which is indisputably rooted in precedents of this Court, Respondent and amici propose some variant of an "eligibility" standard. Amicus CJLF support the Fifth Circuit's standard. Respondent, however, proposes a test that proves even more restrictive than the Fifth Circuit's standard by requiring "the petitioner [to] show that he is actually innocent of the underlying crime that makes him eligible for the death penalty." Res. Br. 27. Respondent's standard is supported by the United States. U.S. Br. 21.

Respondent and amici attempt to defend their radical tests by purportedly returning to "the roots of the innocence exception." CJLF Br. 9. However, the standards promoted by Respondent and its amici *reject* this Court's actual innocence case law, including *Kuhlmann*, *Carrier*, *McCleskey*, and *Smith*. To discover the roots of the various eligibility standards proposed by Respondent and amici, one must examine another tree altogether – *Jackson v. Virginia*, 443 U.S. 307 (1979).

A. Respondent And Amici Reject *Kuhlmann*, *Carrier*, And *McCleskey*, And Mistakenly Rely On *Jackson v. Virginia*.

Respondent and amici repeatedly cite this Court's decision in *Jackson* where they should cite this Court's decisions in *Kuhlmann*, *Carrier*, and *McCleskey*. To take only one, startling example, according to the federal government:

> A person is actually innocent if no reasonable jury could find beyond a reasonable doubt that he committed all of the elements of a charged offense. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

U.S. Br. 14. *See also id.* at 20, 21; Res. Br. 10, 26, 27, 47.

This is an unabashed misstatement of the law, and demonstrates conclusively that Respondent and amici fail to comprehend this Court's miscarriage doctrine. *Kuhlmann* plainly states that the miscarriage doctrine applies when a prisoner can show there is a *"fair probability* that . . . the trier of the facts would have entertained a reasonable doubt of his guilt." 477 U.S. at 454-455, n.17 (emphasis added).[6]

The reason that Respondent and amici seek to replace this Court's decisions in *Kuhlmann, Carrier, McCleskey* and *Smith* with this Court's decision in *Jackson* is clear. Respondent and amici devote large sections of their briefs attempting to challenge Sawyer's proposed standard with the following argument: a petitioner cannot bring a *Jackson* challenge to his death sentence under federal constitutional law because there is no correct outcome in a sentencing phase; therefore, a petitioner may not challenge his death sentence as a fundamental miscarriage of justice. Res. Br. at 13; 15; 17; 22; 26. U.S. Br. 14, 20-21; CJLF Br. 27.

This argument is plainly erroneous. Like a defendant challenging his conviction under *Kuhlmann*, Sawyer does not challenge his jury's determination in light of the evidence presented to it, as would be the case under *Jackson*. Rather, Sawyer asserts that his jury's determination was shewed by

[6] Both amicus and Respondent erroneously replace *Kuhlmann* with *Jackson* without even acknowledging Petitioner's extensive demonstration that the Fifth Circuit's reliance on *Jackson* was completely misplaced. Pet. Br. 23-27; Res. Br. 48. As Petitioner pointed out in his brief, the *Jackson* sufficiency test is itself an eligibility test, asking whether the defendant was eligible for a conviction. Pet. Br. 23-27. *Jackson* is as irrelevant to an actual innocence analysis as it is essential to the standard promoted by Respondent in this Court. *See* Pet. Br. 23-27.

false aggravating evidence and by the jury's failure to hear true mitigating evidence. Sawyer asks a federal judge not to decide whether his jury's determination was correct, but whether there is a probability that the determination would have been different if the jury had not been exposed to the false aggravating evidence and if the jury had been presented with the true mitigating evidence. In other words, the "correctness" of the jury's determination is not questioned by Sawyer, just as it is not questioned by a defendant who asserts a *Kuhlmann* claim with respect to his conviction. In short, even assuming *arguendo* that a capital murder sentencing decision cannot be correct or incorrect,[7] that does not mean that: (1) such a decision cannot be skewed by false evidence or by the failure to admit true evidence; or (2) it is for some unexplained reason inappropriate to inquire whether there is a fair probability the outcome would have been different, absent the skewing.

B. Respondent And Amici Reject This Court's Decision In *Smith v. Murray*.

In their briefs, Respondent and the federal government contend that the innocence exception should not apply to an alleged error at a capital sentencing proceeding. *See, e.g.*, U.S. Br. 24 ("[t]he nature of the sentencing judgment in capital cases . . . suggests that a defendant's actual innocence is best determined by reference to his guilt of the underlying

[7] Respondent claims that "this Court noted that there is no objective measure by which the sentencer's decision can be deemed correct or erroneous so long as it is made within the authority conferred by the legislature." Res. Br. 17 (citing *Bullington v. Missouri*, 451 U.S. 430, 444 (1981)). However, this phrase is found not on the cited page, or even in the majority opinion, but in the dissent. 451 U.S. at 450. In any event, there *is* a correct outcome under Louisiana law. *State v. Sonnier*, 380 So. 2d (La. 1979) (death sentence vacated because "jury disregard[ed] numerous and persuasive mitigating circumstances that clearly outweigh the aggravating circumstances").

crime");[8] Res. Br. 13.[9] The short and dispositive answer to this contention is that both *Smith* and *Adams* extended the availability of the actual innocence exception to capital sentencing claims.[10] The only issue in this litigation is *how* – not *whether* – the standard will be translated into the capital sentencing context.

Amicus CJLF seeks to distinguish *Smith* by arguing weakly that *Smith* "does not contradict the eligibility test." CJLF Br. 20. Amicus then wildly speculates about how the Court *might* have ruled *if* it had reached the merits of Smith's claim of constitutional error. Further, amicus is compelled to erroneously label as "dicta" (CJLF Br. 24) *Smith*'s express

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[8] The federal government also argues that Sawyer's standard, which is taken directly from *Smith*, "would be the appropriate standard if the question were whether a prisoner had shown actual prejudice in his first habeas petition, but it is insufficiently deferential to the State's interest in finality in circumstances like these." U.S. Br. 26. Again, this issue is settled. This Court, in *Smith* and, indeed, in *Kuhlmann* held that the State's important interest in the finality of its judgments must yield when a petitioner can make out a colorable showing of factual innocence.

[9] At one point in its brief, Respondent claims that this Court's decisions in *Smith* and *Adams* contain "[i]mplications" of its eligibility standard. Res. Br. 19-20. Respondent fails to indicate how either of these cases provide any support for the eligibility theory, and they clearly do not. Indeed, Respondent is compelled to conclude its laconic discussion of *Smith* by acknowledging that "[i]n rejecting petitioner's claim, this Court determined that the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." Res. Br. 20 (citing *Smith*, 477 U.S. at 538). Elsewhere, Respondent argues at length that Sawyer's jury did not receive distorted or inaccurate information. *See* Res. Br. 36-46. For the most part, however, Respondent recognizes that to prevail it must reject *Smith*'s concern with inaccurate evidence. *See* Res. Br. 31 ("[t]he jury had information regarding Sawyer's . . . personality disorder, *whether accurate or not*. . . . ") (emphasis added).

[10] A longer answer, also dispositive, is that the eligibility concept cannot be reconciled with the Eighth Amendment's core concern with individualized sentencing. *See infra*.

holding that petitioner's claim was rejected because "[i]n short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." 477 U.S. at 538.[11]

IV. ELIGIBILITY IS A FLAWED CONCEPTION OF DEATH INNOCENCE.

Because they propose eligibility standards, Respondent and amici must assert that any member of a death-eligible class deserves to die and that no injustice occurs by executing anyone within the class. However, as Petitioner pointed out in his brief, the concept of eligibility collides with the Eighth Amendment's core concern for individualized consideration. Pet. Br. 31-34. As this Court recently stated, "Our decisions subsequent to *Jurek [v. Texas*, 428 U.S. 268 (1976)] have reaffirmed that *the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty.*" *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (emphasis added)).[12]

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[11] Originally, Smith's attorney sought the psychiatric evaluation to explore psychiatric mitigating evidence. *See* Question I, Petition for Writ of Certiorari (available on LEXIS), *Smith v. Murray*, 477 U.S. 527 (1986), *cert. granted sub nom. Smith v. Sieleff*, 474 U.S. 918 (1985). The statement of facts contained in Smith's brief states that counsel sought psychiatric evaluation "in order to explore the availability of psychiatric defenses to the charges and especially of claims in mitigation based on psychopathology." Brief for Petitioner, *Smith v. Murray*, 477 U.S. 527 (1986) (available on LEXIS).

[12] In *Penry*, this Court also stated that, "full consideration of evidence that mitigates against the death penalty is *essential* if the jury is to give a reasoned moral response to the defendant's background, character and crime" (492 U.S. at 328 (quotations omitted; emphasis omitted and added)), and that "[e]vidence concerning . . . the defendant's . . . emotional history . . . bears directly on the *fundamental justice of imposing capital punishment.*" *Id.* at 338 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (concurring opinion) (emphasis

(Continued on following page)

Indeed, this Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), recognized that:

> *[A]ccurate sentencing information* is an *indispensable prerequisite* to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

428 U.S. at 190 (emphasis added).

If *accurate* sentencing information is an *indispensable prerequisite* to a reasoned determination of whether a defendant shall live or die, then any rational conception of death-innocence must allow for claims of error which *seriously* implicate the integrity of the sentencing profile. Because eligibility *refuses to even consider claims of error pertaining to mitigating evidence*, it must fail as a touchstone of death-innocence under the Eighth Amendment.

Respondent and amici make no principled attempt to defend the merits of eligibility as a concept for determining death-innocence, or to reconcile the concept with this Court's Eighth Amendment jurisprudence. Instead, they merely insist that any attempt to apply the miscarriage of justice concept to a capital sentencing proceeding will not work. The argument apparently proceeds as follows: (1) guilt-innocence determinations, including determinations as to a defendant's eligibility for the death penalty, are governed by objective criteria that preclude jury discretion; (2) capital sentencing determinations are subjective and discretionary; (3) the standard set forth by this Court in *Kuhlmann* depends on the objective criteria that govern guilt-innocence determinations; and (4) the *Kuhlmann* standard, as adopted for innocence of death

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added)). Accordingly, it certainly would be a *fundamental miscarriage of justice* to deny a petitioner the right to a hearing on a successive claim that demonstrates that he was sentenced to death because the jury considered a grossly distorted picture of his emotional history.

claims, can only be applied to determinations as to a defendant's eligibility for the death penalty. *See* Res. Br. 13-16, 21-22, 26.

This argument is fatally flawed. Even assuming *arguendo* that guilt-innocence determinations are somehow "more objective" than sentencing determinations, this proves nothing. As Respondent concedes, the "process of selecting those eligible defendants for whom death is appropriate is the trier of fact's '[reasoned][13] moral response' to the evidence presented by the state and the defendant." Res. Br. 15. If the determination of whether or not a defendant deserves a death sentence is necessarily a "reasoned moral response" to aggravating and mitigating evidence, then a defendant is innocent of the death penalty if the sentencer's reasoned moral response is to vote for a life sentence.[14] Therefore, it certainly "makes sense," to use Respondent's phrase, to conclude that a petitioner may be innocent of his death sentence if he demonstrates: (i) his jury, in conducting its reasoned moral inquiry, considered false aggravating evidence or did not consider true mitigating evidence; and (ii) there is a probability that the jury's sentence would have been different if the jury, in conducting its reasoned moral inquiry, had not considered the false facts or had considered the true facts.

Nowhere does Respondent explain why the "actual innocence of death" standard should not embrace a factually-skewed reasoned moral inquiry into the appropriate sentence merely because the moral inquiry is supposedly more "subjective" than an inquiry into a defendant's guilt or innocence.[15]

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[13] The moral inquiry is a "*reasoned* moral inquiry." *Penry*, 492 U.S. at 328 (emphasis added).

[14] Conversely, one is guilty of the death penalty if the *reasoned* moral inquiry produces a death sentence. *See, Poland v. Arizona*, 476 U.S. 147, 156 (1986) (noting that one is guilty of the death penalty when "a defendant is sentenced to death, i.e., 'convicted.' ").

[15] Respondent mistakenly cites *McCleskey* as support for its position. Res. Br. 19. *McCleskey* turned solely on the truthfulness of the evidence, not on "objective criteria." 111 S.Ct. at 2474-1475.

The purported "subjectivity" of a sentencing determination might be a relevant factor if, under Sawyer's standard, a petitioner were challenging the result of his jury's moral inquiry as "incorrect," but Sawyer's standard encompasses no such challenge. *See supra.*

In any event, Respondent, at best, overstates the alleged distinction between the objective criteria that purportedly govern a guilt-innocence determination and the subjectivity that purportedly infuses a sentencing determination. This Court has consistently recognized that a jury's decision as to the guilt or innocence of a criminal defendant necessarily involves a large degree of discretion and subjectivity. *Jackson* itself demonstrates this point. Convictions are not reversed under *Jackson* merely because a reasonable juror could have found the defendant innocent. Thus, *Jackson* recognizes that some reasonable jurors might vote to convict when others would vote to acquit, and recognizes, as well, that the differing outcomes are a result of the subjectivity and discretion that play – and must play – such a large role in jury guilt-innocence determinations.[16]

Further, Respondent errs in contending that the decision as to whether "the defendant deserves a particular punishment" is "merely . . . subjective." Res. Br. 16. The Louisiana capital punishment statute contains objective factors governing aggravating circumstances and mitigating circumstances.[17] In addition, as Petitioner has pointed out, a capital

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[16] *Jackson* developed a highly deferential standard of review to give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." 443 U.S. at 319. Indeed, elsewhere in its brief, the State acknowledges this fact. *See* Res. Br. 26 ("core concern of *Jackson v. Virginia* . . . was developed to insulate *the discretionary function of the jury from judicial scrutiny*") (emphasis added).

[17] Two mitigating circumstances relate to mental disorders. *See* La. Code Crim. Proc. Ann. Art. 905.5 (West 1984).

jury is required to consider evidence proffered in mitigation (*see supra*), and this Court has indicated that a jury may not consider false or misleading aggravating evidence. *Zant v. Stephens*, 462 U.S. 862, 887, n.23 (1983).[18]

V. SAWYER'S HISTORY OF SEVERE MENTAL DISORDERS MAKES HIS THE EXTRAORDINARY CASE.

In his brief, petitioner demonstrated that his richly documented history of crippling mental disorders makes his the extraordinary case that compels application of the fundamental miscarriage of justice doctrine. Pet. Br. 38-39. In response, Respondent erroneously implies that Sawyer's 1990 psychiatric reports are the product of "new, 'friendly' expert[s]." Res. Br. 23. Respondent also incorrectly contends that the 1990 reports "lack credibility because their conclusions are speculative and unsupported by objective evidence in the record." Res. Br. 34. *See also id.* at 38, 41.

Respondent's assertions are difficult to fathom. Sawyer's history of mental disorders is abundantly documented in several sets of records pre-dating Sawyer's trial. The 1990 psychiatric reports merely confirm this history. Thus, for example, records of Sawyer's teenage institutionalizations (JA 537-540) directly support the current diagnoses of mental

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[18] Equally unavailing is Respondent's and amicus CJLF's contention that Sawyer's standard requires federal courts to "reweigh[ ] the evidence from the penalty phase." Res. Br. at 22; 15; 17; 21; 22; 24. *See also* CJLF Br. at 24. Under Sawyer's standard, federal courts merely are required to determine whether the petitioner's sentencer was presented with false aggravating facts or was not presented with true mitigating facts and, if so, whether there is a probability that the sentencer's decision would have been different in light of all the probative evidence. As Petitioner pointed out in his brief, federal courts routinely evaluate the impact of penalty phase error. Pet. Br. at 30-31 (citing, *inter alia*, *Strickland v. Washington*, *supra*).

retardation and frontal lobe dysfunction. JA 541-568. Moreover, laboratory tests support the early and more recent diagnoses of organic impairment. Sawyer had an abnormal electroencephalogram in 1965.[19] JA 538, More sophisticated laboratory testing (magnetic resonance imaging, or MRI) in 1990 yielded further evidence of organic impairment: "The MRI provides supporting evidence that he has brain damage." JA 546-547. Further, the 1990 evaluations also are supported by hospital records, clinical interviews, school records, a complete social history, a documented history of head trauma, intelligence testing, neurological testing, and both objective and projective psychological test data. JA 542-543, 559-562.

The speculative psychiatric findings in this case were presented to the jury by incompetent trial counsel. Respondent urges this Court to accept the state psychiatrists' findings,[20] contending that the diagnosis of sociopathy "may be an accurate diagnosis of Mr. Sawyer at that time in his life." Res. Br. 35-36 (citing *Diagnostic and Statistical Manual of*

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[19] Respondent maintains that "[a]n abnormal EEG is not unusual. . . . " Res. Br. 39. Not surprisingly, Respondent provides no authority for this proposition. The reason that Sawyer's more recent EEG was within normal limits is that the instrument is better at detecting abnormality in youths than adults. "An EEG is indicated in schizophrenic patients who are younger [or] are presenting with their first psychotic episode. . . . " Kaplan and Saddock, *Comprehensive Textbook of Psychiatry*, 530 (5th ed. 1989). In any event, more advanced laboratory testing in 1990 not only identified Sawyer's organic impairment, but located the affected area. JA 546-547.

[20] Drs. DeVillier and Arneson based their diagnoses on a brief interview with Mr. Sawyer. J.A. 341-346. The Louisiana Supreme Court has criticized Dr. DeVillier's psychiatric findings in a virtually identical situation. *State v. Hamilton*, 373 So.2d 179, 183 (1979) (reversing finding of competency to proceed since, *inter alia*, trial court relied on Devillier's conclusions which were "unsupported by reasons and factual information, and is supported only by a twenty minute interview and the doctor's experience").

Mental Disorders[21] ("DSM")). The DSM, however, provides no support for Respondent's position because the state psychiatrists neglected to rule out organic dysfunction before reaching their diagnostic impressions.[22]

Respondent challenges lifelong documentation of mental retardation by suggesting that Mr. Sawyer is a riverboat pilot. Respondent engages in an unauthorized romp outside the record by referring to "testimony" by Mr. Sawyer at the two clemency proceedings conducted before the Louisiana pardon board.[23] Res. Br. 30-31, 40, 43. These extra-record excursions violate one of the most time-honored rules of appellate practice – that counsel may not refer to matters outside the record on appeal. *Russell v. Southard*, 53 U.S. (12 Howard) 139, 159 (1852).

Part of this "testimony" is accurately reported, part is not. Respondent accurately reports that Sawyer told the pardon board that he had passed the coast guard licensing test, which is admittedly quite difficult.[24] Respondent, however, neglects to cite to *the only evidence in the record on this point* – a letter from U.S. Coast Guard Commander R. G. Ross establishing that Sawyer did not hold a riverboat pilot's license. R. 1264.

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[21] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Revised 3rd ed. 1987).

[22] *See* DSM, xxiv-xxv ("[w]hen an Organic Mental Disorder can account for the symptoms, it preempts the diagnosis of any other disorder that could produce the same symptoms"). The psychologist who evaluated Sawyer in 1990 recognized this fact. *See* JA 568.

[23] Witnesses are not under oath at the pardon board proceedings. Moreover, no record, formal or informal, exists of these proceedings. They are neither stenographically reported nor recorded in any other fashion.

[24] Respondent inaccurately reports the "testimony" of Dr. Alec Whyte concerning his response to Sawyer's statements. It is tempting, of course, to set the record straight on this matter. But since there is no record to cite to, this would simply pit Petitioner's word against Respondent's.

Respondent suggests that Mr. Sawyer's testimony rebuts the abundant documentation of mental retardation in this case. In fact, it illuminates the gravity of Sawyer's mental disabilities. While Sawyer's counsel attempted to convince the pardon board that he was too impaired to be executed,[25] Sawyer pathetically attempted to portray himself as a skilled riverboat navigator. This misguided, self-defeating behavior, known as "cheating to lose," is common among the mentally retarded.[26]

Finally, Respondent attempts to minimize the significant mitigating value of evidence of mental retardation by noting that "Sawyer does not offer any evidence of the general behavior of jurors with respect to sentencing mentally retarded defendants. . . . " Res. Br. 39. In fact, the only such study establishes that capital jurors in two Southern states, including Louisiana, consider mental retardation *more mitigating than any other category of evidence*. Sandys (1991, November) *The Life and Death Decisions of Capital Jurors: Preliminary Findings From Kentucky*,[27] (paper presented at the annual meeting of the American Society of Criminology, San Francisco, CA).[28] On the other hand, none of the jurors

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[25] Ultimately, the pardon board recommended clemency, but the governor rejected the recommendation.

[26] *See* Ellis and Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 430 (1985) ("Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma. *In a similar vein, some mentally retarded people make ill-advised and damaging attempts to enhance their status or deny their disability in the courtroom*" (footnote omitted; emphasis added)).

[27] The data set includes 30 jurors from Kentucky and 13 from Louisiana.

[28] Post-trial interviews with capital jurors revealed that 79% of the respondents viewed a defendant's mental retardation as mitigating. "The factor most clearly interpreted as mitigation is that the defendant was mentally retarded (by 79%)." *Id.* at 7. The same results obtained for the Louisiana subset. "In fact, mental retardation again was the factor most

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surveyed viewed either mental retardation or mental illness as an aggravating factor, which rebuts the government's unsupported allegation that evidence of mental illness may aggravate the offense. U.S. Br. 18, n.9. *See also Zant v. Stephens*, 462 U.S. 862, 885 (1983) (state may not treat mental illness as aggravation); *Penry*.

Moreover, since *Penry*, in addition to Georgia and the federal government, 492 U.S. at 356, four states have enacted legislative bans against executing retarded citizens. *See* Ky. Rev. Stat. Ann. Sec. 532.140 (Michie/Bobbs-Merill 1990); Md. Code Ann. art. 27, Sec. 412 (f) (1) (1990); N.M. Stat. Ann. Sec. 31-20A-2.1 (Michie 1991); Tenn. Code Ann. Sec. 39-13-2-3 (1990).

CONCLUSION

For the reasons advanced herein and in the Brief for Petitioner, this Court should reverse the Court of Appeals' decision and remand this case for a hearing on the merits of Mr. Sawyer's claims of constitutional violations. Alternatively, should this Court uphold the Court of Appeals' proposed test, this case should be remanded to the federal district court for a hearing on the merits of the claim that the state withheld exculpatory evidence, and to the Supreme Court of Louisiana to determine whether Mr. Sawyer is

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clearly interpreted as mitigation by the Louisiana jurors. Therefore, as in KY, mental retardation was a stronger mitigator than any of the other 17 (mitigating) factors questioned." *Id.* The next most clearly defined category was that the defendant had a history of mental illness (69%). *Id.*

"eligible" for the death penalty under state law, specifically, Louisiana Supreme Court Rule 28.

Respectfully submitted,

*Nicholas J. Trenticosta
R. Neal Walker
Sarah L. Ottinger
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

Counsel for Petitioner

Of Counsel:

John H. Holdridge
210 Baronne Street
Suite 608
New Orleans, Louisiana 70112
Telephone: (504) 522-0578

*Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM 1991

ROBERT WAYNE SAWYER,
Petitioner,
v.
JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
Respondent.

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. SUGGESTING REVERSAL

Julius L. Chambers
George H. Kendall
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, N.Y. 10013

Larry W. Yackle
Boston University School of Law
765 Commonwealth Ave.
Boston, Mass. 02215

Douglas G. Robinson*
Julia E. Sullivan
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Amicus Curiae
*Counsel of Record

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No. 91-6382

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

ROBERT WAYNE SAWYER,
Petitioner,

v.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
Respondent.

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. SUGGESTING REVERSAL

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") submits this brief, pursuant to Rule 37 of the Court's rules, as amicus curiae to assist the Court in formulating an appropriate standard for determining whether the federal courts should entertain a second habeas corpus petition such as that filed

by the Petitioner here, Robert Wayne Sawyer. For the reasons stated herein, LDF submits that this is a rare and exceptional case that warrants federal court consideration of Mr. Sawyer's petition.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

LDF is a non-profit corporation established to assist black citizens in securing their constitutional rights. Beginning in 1967, it has represented indigent death-sentenced prisoners for whom adequate representation could not otherwise be found. It has frequently represented such prisoners before this Court. Furman v. Georgia, 408 U.S. 238 (1972); Estelle v. Smith, 451 U.S. 454 (1981); Enmund v. Florida, 458 U.S. 782 (1982); McCleskey v. Kemp, 481 U.S. 279 (1987); Selvage v. Collins, 494 U.S. 108 (1990). LDF also has appeared before the Court as amicus curiae in capital cases.

E.g., Adams v. Texas, 448 U.S. 38 (1980); Barefoot v. Estelle, 463 U.S. 880 (1983).

LDF currently represents a substantial number of indigent, condemned prisoners throughout the country, including several who are at various stages of federal habeas corpus proceedings. It is frequently called upon, and it tries to the extent of its capabilities, to provide consultative assistance to attorneys representing other capital defendants across the nation. As a result of these activities, LDF is in a unique position of having knowledge and experience regarding the application of the death penalty in most of the states in which the penalty is authorized.

LDF therefore believes it can provide the Court with useful insight on the important issue raised by this case. Consent has been granted by both Petition-

er and Respondent for the filing of this amicus curiae brief.

II. SUMMARY OF ARGUMENT

A. The precedents of this Court provide that a successive habeas petition like that involved here will be considered by the federal courts only upon a showing that a "miscarriage of justice" may occur if the petition is not reviewed. See McCleskey v. Zant, 111 S. Ct. 1454 (1991); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Smith v. Murray, 477 U.S. 527 (1986). That standard is met only upon a "fair probability" or "colorable showing" of "actual innocence," based on all the probative evidence, including evidence claimed to have been erroneously admitted of excluded. Kuhlmann, 477 U.S. at 454 and n.17 (plurality opinion). The "actual innocence" formulation applies in the sentencing context as well, although it is

not readily translatable to that context. Smith v. Murray, 477 U.S. at 537. While "miscarriage of justice" remains the controlling principle, the Court also gives significant consideration to a state's interests, including finality of its criminal convictions, and to the burden that habeas proceedings impose on limited federal judicial resources. See McCleskey, 111 S. Ct. at 1468-69.

The "eligibility" test applied by the Fifth Circuit in this case in refusing to consider Mr. Sawyer's second habeas petition does not meet any of the foregoing considerations fully and does not meet the most important ones at all. That mechanical test is particularly deficient because it would deny relief in procedural default or successive petition cases where, despite the defendant's technical or "legal" eligibility for the death

sentence, no reasonable jury would have imposed it. Thus, in the most deserving of cases the eligibility test still would not prevent miscarriages of justice. Further, on close examination the eligibility test is not fully consistent with all legitimate state interests and would do little to relieve the burden on federal courts.

In order to be true to its previously announced standards, this Court should formulate a test for determining "actual innocence" in a sentencing context that turns on a "fair probability" or "colorable showing" that a reasonable sentencer, faced with all the evidence, would not have imposed the death penalty. A "more probable than not" test, while arguably more stringent than the "fair probability" or "colorable showing" standard, would reasonably limit relief to the

extraordinary case involving a true miscarriage of justice, while at the same time meeting the Court's concerns about deference to state interests and reduction of the federal court burden.

B. The evidence proffered in Mr. Sawyer's habeas petition suggests that this is in fact the rare case where a miscarriage of justice may have occurred. That evidence, which was not presented to his sentencing jury because of the ineffectiveness of his trial counsel, contradicts the evidence that was presented -- namely, that Mr. Sawyer was a sociopath and a sadist who should be held fully responsible for his actions. An accurate sentencing profile shows instead that his actions at issue here were the result of, among other things, severe head trauma and brain damage that prevents him from controlling his aggression. This and other

evidence offered by Mr. Sawyer has often been held to be of the type that is relevant to a jury's death penalty deliberations because it can be viewed as lessening moral culpability, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989), and in this case is so unusually compelling as to meet the "more probable than not" standard.

III. ARGUMENT

A. The Standard for Determining Whether There Has Been a Miscarriage of Justice in a Sentencing Context Must at a Minimum Cover Cases Where It Is More Likely Than Not That the Jury Would Not Have Imposed the Death Penalty Had It Been Presented with Accurate Information.

1. This Court's Prior Decisions

Mr. Sawyer raises in this second federal habeas proceeding three claims of constitutional error. The claim we will focus on here -- that Mr. Sawyer's counsel was unconstitutionally ineffective during

the sentencing phase of his capital murder trial -- was raised, albeit in a much more abbreviated form, in Mr. Sawyer's first federal habeas petition. The Respondent argues that a second petition raising this claim again, even in its greatly expanded form, should be rejected because of the limitations on successive petitions contained in 28 U.S.C. § 2244(b). The Fifth Circuit agreed and refused to consider Mr. Sawyer's new mitigation evidence that he claims was not presented to the jury because of his trial counsel's ineffectiveness and would probably have produced a different sentencing outcome had it been presented.

It is settled law that Mr. Sawyer's ineffectiveness claim can be considered in a successive petition only if he can show that a "fundamental miscarriage of justice" may occur if the claim is not

reviewed. McCleskey, 111 S. Ct. at 1457; see Murray v. Carrier, 477 U.S. 478, 495-96 (1986).[1] A plurality of the Court has said that, in examining the question of whether a "fundamental miscarriage of justice" has occurred, the courts must look to whether all probative evidence, including that which was arguably improperly admitted or excluded, makes out a "colorable showing of factual innocence." Kuhlmann, 477 U.S. at 454 and n.17.[2] The

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1 Carrier, as well as other precedents cited here, involved a claim that had been procedurally defaulted, rather than, as here, a "successive" claim raised in a second federal habeas petition. Such cases are relevant here, however, because the Court has held that the same "miscarriage of justice" standard applies in both procedural default and successive petition cases. McCleskey, 111 S. Ct. at 1470.

2 To be technically precise, the plurality in Kuhlmann applied an "ends of justice" rather than a "miscarriage of justice" standard to a case, like this one, involving a successive
(Footnote continued)

"factual innocence" standard applies to constitutional errors committed at the sentencing as well as at the guilt-innocence phase of a capital trial. Smith v. Murray, 477 U.S. at 537; see also Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989).

Kuhlmann, Smith v. Murray and their progeny have drawn heavily upon the views of Judge Friendly in his seminal law review article, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). In Kuhlmann, Justice Powell made explicit that the requirement of a "colorable showing of factual innocence" adopted there was the

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petition. However, the decisions of the Court indicate that for all practical purposes the two standards are the same. See McCleskey, 111 S. Ct. at 1471; Smith v. Murray, 477 U.S. at 537-38.

same as that "persuasively" proposed by Judge Friendly:

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of facts would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.

Kuhlmann, 477 U.S. at 454-55 .17 (emphasis in original; citations omitted).

Since Kuhlmann, this Court has consistently followed Judge Friendly's prescription that "fundamental miscarriage of justice" equates to a colorable

showing[3] of "actual innocence" based on all the evidence. See, e.g., Smith v. Murray, 477 U.S. at 537; Carrier, 477 U.S. at 496; McCleskey, 111 S. Ct. at 1471. While the Court has held explicitly that this standard will apply to constitutional violations occurring at the sentencing phase, as well as the guilt-innocence phase, it at the same time has conceded that the actual innocence concept does not "translate easily" to sentencing phase violations. Smith v. Murray, 477 U.S. at 537.

In surveying relevant precedents of this Court, it is also appropriate to

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[3] Judge Friendly used the term "fair probability" to describe the burden of proof on the petitioner to show that the result would have been different. 38 U. Chi. L. Rev. at 160. Justice Powell equated that formulation to a "colorable showing." Kuhlmann, 477 U.S. at 454, 455 n.17.

note that the Court in recent years has expressed concern in procedural default and successive petition cases about the costs of federal habeas. For example, in McCleskey, the Court pointed out the desire for finality in state criminal convictions and concern for comity owed to state judgments. 111 S. Ct. at 1468-69. In addition, the Court has expressed concern about the burden that habeas petitions, and particularly second petitions, place on "scarce federal judicial resources." Id. at 1469.

However, it is plain from the Court's decisions that considerations of finality, comity and burden on judicial resources are secondary to the need to avoid a miscarriage of justice. As the Court said in Murray v. Carrier, "'[i]n appropriate cases' the principles of comity and finality . . . 'must yield to the

imperative of correcting a fundamentally unjust incarceration.'" 477 U.S. at 495 (quoting Engle v. Issac, 456 U.S. 107, 135 (1982)); see also McCleskey, 111 S. Ct. at 1469 ("The federal writ of habeas corpus overrides all these considerations, essential as they are to a rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner . . ."). Thus, the Court's recent decisions indicate that interests of finality, comity and reduction of burden on the federal courts have some relevance in making the equitable determination of whether defaulted or successive petitions should be entertained, but they are secondary to the controlling issue of whether a miscarriage of justice has been demonstrated through a showing of actual innocence.

In the two instances in which the Court has been called upon to apply

these principles in a sentencing phase context, the Court was able to dismiss the claims without having to provide additional guidance as to exactly how the "translation" of the actual innocence standard to the sentencing phase should be made. In Smith v. Murray, the Court readily disposed of the claim that the sentencing-phase testimony of a court-appointed psychiatrist reporting on Smith's confession to a prior offense violated his privilege against self-incrimination. The Court observed that the testimony "did not serve to pervert the jury's deliberations concerning the ultimate question whether in fact petitioner constituted a continuing threat to society." 477 U.S. at 538 (emphasis in original). In reaching that conclusion, the Court considered it important that "the alleged constitutional error neither precluded the development of

true facts nor resulted in the admission of false ones." Id.

Similarly, the Court was able to dispose readily of a procedurally defaulted claim in Dugger v. Adams that the trial court had improperly instructed the jury on its role in sentencing. The Court stated:

> We do not undertake here to define what it means to be "actually innocent" of a death sentence. But it is clear to us that the fact that the trial judge in this case found an equal number of aggravating and mitigating circumstances is not sufficient to show that an alleged error in instructing the jury on sentencing resulted in a fundamental miscarriage of justice.

489 U.S. at 412 n.6.

This case, however, cannot be disposed of so readily. Here, unlike in Smith v. Murray and Adams, the alleged constitutional error did "preclude[] the development of true facts" relevant to the

sentencing-phase inquiry. See Smith v. Murray, 477 U.S. at 538. Mr. Sawyer presents extraordinary evidence of mental disorders that was not presented to the jury because of ineffective assistance of counsel. This evidence relates directly to the factual inquiry the jury was required to make under the Eighth Amendment and Louisiana law to determine whether Mr. Sawyer should be sentenced to death, and it casts serious doubt on whether the jury would have imposed death had it been aware of this evidence. Thus, the facts of this case force the Court to confront the issue as to exactly how the "actual innocence" concept is to be applied when the alleged constitutional error directly implicates the accuracy of the facts upon which a sentence of death was based.

2. Lower Court Attempts to Apply the "Actual Innocence" Standard in a Sentencing Context.

That further guidance is required from this Court on how to apply the "actual innocence" standard in a sentencing context is evident from five recent cases, including this one, in which four different courts of appeals have adopted inconsistent positions.

At one end of the spectrum of possible results are the decisions of the three-judge panel of the Fifth Circuit in this case and of a bare majority of the Eleventh Circuit sitting en banc in Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991), pet. for cert. filed, No. 91-6576, (Dec. 3, 1991). In this case, the alleged constitutional violation is that Mr. Sawyer's court-appointed trial counsel provided ineffective representation at the sentencing phase by failing to present

extensive evidence that, among other things, Mr. Sawyer was severely abused as a child; he has significant brain damage, probably incurred from such abuse; he suffers from mental retardation; and, as a result particularly of damage to the frontal lobes of his brain, he is unable to control his aggression. Not only did this evidence go beyond anything the jury had heard, but it also cast much of what the jury did hear in an entirely different light. See infra at 47-59.

Despite the compelling and even extraordinary nature of this mitigating evidence, which plainly makes a difference in a proper evaluation of Mr. Sawyer's moral culpability, the Fifth Circuit panel determined that he did not establish a colorable claim that he was "actually innocent" of the death penalty. Louisiana's death penalty statute, like that of

most other states, requires a jury imposing a death penalty to find, beyond a reasonable doubt, at least one statutorily specified aggravating circumstance and to determine that the aggravating circumstances it has found are not outweighed by any mitigating evidence that is presented. La. Code Crim. Proc. Ann. art. 905.3-5 (West Supp. 1991).[4] The panel reasoned

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[4] Other state death penalty statutes have similar requirements. See, e.g., Ala. Code §§ 13A-5-46(c), 13A-5-45(e)(2), 13A-5-47(e), 13A-5-48, 13A-5-53 (1990); Ark. Code Ann. §§ 5-4-602(3), 5-4-602(4), 5-4-603 (Michie 1991); Cal. Penal Code §§ 190.3, 190.4(e) (West Supp. 1991); Colo. Rev. Stat. Ann. § 16-11-103 (West 1991); Conn. Gen. Stat. Ann. §§ 53a-46a (West 1991); Del. Code Ann. tit. 11, § 4209 (1990); Fla. Stat. Ann. § 921.141 (West 1991); Ga. Code Ann. §§ 17-10-2, 17-10-30 (Michie 1991); Idaho Code §§ 18-4505, 19-2515 (West 1991); Ill. Rev. Stat. Ch. 38, para. 9-1 (West 1991); Ind. Code § 35-50-2-9 (West 1991); Ky. Rev. Stat. Ann. § 532.025 (Michie/Bobbs-Merrill 1985); Md. Ann. Code of 1957, art. 27, §§ 413, 414 (1957); Mass. Gen. L. ch. 279, §§ 68, 69, 71 (1991); Miss.

(Footnote continued)

that because Mr. Sawyer's new evidence of mental defect does not implicate either of the two statutory aggravating circumstances found by the jury, Mr. Sawyer still would have been "eligible" to receive the death penalty, regardless of whether, in light of the mitigating evidence, the jury would actually have sentenced Mr. Sawyer to death. Thus, the court determined that a petitioner who technically could receive the death penalty cannot be considered "actually innocent" of that penalty, no matter how remote the possibility that the jury would have imposed such a penalty had it been aware of the true facts.

The majority of an en banc Eleventh Circuit Court of Appeals reached the same result on different facts in Johnson v. Singletary.[5] Johnson raised for the first time in a second habeas petition a

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(Footnote 4 continued from previous page)
Code Ann. § 99-19-103 (Supp. 1990); Mo. Ann. Stat. §§ 565-030, 565.032 (Vernon Supp. 1991); Mont. Code Ann. §§ 46-18-302, 46-18-305, 46-18-306 (1991); Neb. Rev. Stat. §§ 29-2519, 29-2520 - 29-2524 (1989); N.H. Rev. Stat. Ann. § 630:5 (1990); N.J. Stat. Ann. § 2C:11-3 (West 1991); N.M. Stat. Ann. § 31-20A-4(c) (Michie 1991); N.C. Gen. Stat. § 15A-2000 (1991); Ohio Rev. Code Ann. § 2929.03(D)(2); 2929.04 (Anderson 1991); Okla. Stat. Ann. tit. 21, § 701.11 (West 1991); 42 Pa. Cons. Stat. Ann. § 9711 (West 1991); S.C. Code Ann. §§ 16-3-20, 16-3-25 (Law Co-op. 1990); S.D. Codified Laws Ann. §§ 23A-27A-1, 23A-27A-2 (1991); Tenn. Code Ann. §§ 39-13-204, 39-13-206 (1991); Utah Code Ann. § 76-3-207 (1991); Va. Code § 19.2-264.4 (1983); Wash. Rev. Code Ann. § 10.95.040 (West 1991); Wyo. Stat § 6-2-102 (1991).

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[5] The court split 6-5. The majority included one senior judge who elected to participate under 28 U.S.C. § 46(c). 938 F.2d at 1168 n.*. Among the dissenters was Chief Judge Tjoflat, who agreed in principle with the "eligibility" test adopted by the majority but disagreed with its application to the Florida sentencing scheme. Id. at 1186. As discussed more fully below, four dissenters disagreed with the majority's "eligibility" test. Id. at 1196.

claim that his sentencing-phase counsel had been ineffective in failing to develop evidence that Johnson's killing of a drug store pharmacist during an armed robbery was the result of Johnson's severe drug addiction. Even in the absence of such evidence, the jury under Florida's sentencing scheme recommended life. The trial judge, however, rejected the jury's recommendation and imposed the death penalty, finding that the evidence showed the existence of five statutory aggravating circumstances and no mitigating circumstances. As the Fifth Circuit did in this case, the en banc majority in Johnson found that the petitioner did not show "actual innocence" of the death penalty because his new evidence, while demonstrating three statutory mitigating circumstances, did not render inaccurate the findings of at least some of the aggravat-

ing factors that made Johnson legally "eligible" for the death penalty.

The Fifth and Eleventh Circuit decisions differ sharply from that of the Ninth Circuit in Deutscher v. Whitley, 946 F.2d 1443 (9th Cir. 1991). In that case, a three-judge panel of the Ninth Circuit specifically rejected the technical "eligibility" test adopted by the Eleventh Circuit in Johnson and adopted as its formulation of the "actual innocence" concept a test that had been articulated by the Eighth Circuit in two recent cases. See 946 F.2d at 1444-46. The Eighth Circuit said that the test to be gleaned from this Court's precedents is that, "'[i]n the penalty-phase context, [the actual innocence] exception will be available if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise

have sentenced to life imprisonment.'" Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1989) (emphasis added) (quoting Smith v. Armontrout, 888 F.2d 530, 545 (8th Cir. 1989)). This formulation, while imprecise, nevertheless appears fully consistent with Judge Friendly's and Kuhlmann's "fair probability" or "colorable showing" test.

Neither the Eighth nor the Ninth Circuits provided much detail, however, as to exactly what degree of "probability" they had in mind. To be sure, Deutscher at one point states that Smith v. Murray requires a showing that it is "more probable than not" that the death penalty would not have been imposed in the absence of constitutional error, 946 F.2d at 1446, even though in fact those words never appear in Smith v. Murray. But, in the end, the court concludes that Deutscher's

claim must be granted because proper mitigating evidence was not considered by the jury and improper aggravating evidence was considered. Id. at 1447.[6] In both Stokes and Smith v. Armontrout, the Eighth Circuit, after announcing its probability test and without additional discussion as to how it would be applied, summarily denied the petitions. The court in effect determined that on any probability standard the result would have been the same.[7]

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[6] One panel member, Judge Hall, agreed with the majority that the "eligibility" test of Johnson "is too stingy to guard against miscarriages of justice," 946 F.2d at 1449, but she disagreed on the basis of the evidence with the majority's conclusion that Deutscher probably will not again be sentenced to death. She too does not define the probability standard she uses, but she implies it is at least more stringent than "reasonable probability." See id. at 1450.

[7] Counting all five cases referred to in the text, a total of 22 court of appeals judges have expressed an opinion on what constitutes actual

(Footnote continued)

A "probability" test that is carefully defined and circumscribed, however, is that set forth in the dissent of four judges of the Eleventh Circuit in Johnson. After carefully reviewing the relevant decisions of this Court, the Johnson dissenters, in an opinion written by Judge Lanier Anderson, concluded that in order to show a miscarriage of justice -- i.e., actual innocence of the death penalty -- a habeas petitioner must show "that the alleged error did in fact cause an inaccurate result." 938 F.2d at 1197 (emphasis in original). "The focus," the

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innocence of the death penalty -- three each in the Fifth and Ninth Circuits, five in the Eighth Circuit, and eleven in the Eleventh Circuit. Of that total, ten have opted for the "eligibility" test and twelve have chosen some formulation of the test that the sentencing outcome "probably" would have been different had the jury known the true facts.

dissent said, "is on the accuracy of the sentencing determination," and "the proper analysis considers all probative evidence," including the evidence in mitigation that was excluded because of the alleged constitutional error. Id. (emphasis in original).

The Johnson dissenters emphasized that the test they are proposing is in fact a stringent one that would apply only in the most extraordinary of cases. As Judge Anderson wrote:

> I recognize that the term "probably" could have two meanings: the lower "reasonable probability" standard or the higher "more likely than not" standard. I propose adoption of the higher standard in order to ensure that the miscarriage of justice concept be reserved for the extraordinary case.

Id. at 1200 n.6. The dissenters pointed out that this proposed standard is significantly more stringent than is the "rea-

sonable probability" test for determining prejudice in ineffective assistance of counsel cases. See Strickland v. Washington, 466 U.S. 668, 694 (1984). In Strickland, this Court noted that this higher, "more probable than not" standard, while not adopted in that case because it was considered too stringent to serve the Court's purposes there, has two advantages: It "defines the relevant inquiry in a way familiar to courts," and it "also reflects the profound importance of finality in criminal proceedings." Id. at 693-94.

3. The "Eligibility" Test Is Not Consistent with the Miscarriage of Justice Standard or with Other Important Habeas Objectives.

Before evaluating the appropriateness of the "eligibility" test adopted by the Fifth and Eleventh Circuits, it is useful to review again the objectives that

this Court has said are important in determining "actual innocence."

Most important, the test must be designed to cover all of those cases in which reasonable persons would agree that a miscarriage of justice has occurred. In other words, the test should lead to an accurate sentencing result in light of all the probative evidence, including that claimed to have been improperly admitted or excluded. Kuhlmann, 477 U.S. at 455 n.17; Smith v. Murray, 477 U.S. at 538.

Additionally, while the foregoing factor must be of paramount importance, the Court can also be mindful of legitimate state interests, including finality, and the demands federal habeas places on federal judicial resources. McCleskey, 111 S. Ct. at 1469.

The "eligibility" test fashioned by the Fifth and Eleventh Circuits meets

neither of these standards fully and does not meet the first one at all. To be sure, the "eligibility" test is on its face so difficult to meet that it could be said to promote the state's interest in the finality of its criminal convictions and to reduce the burden on judicial resources. But, in reality, the "eligibility" test is so extreme that for all practical purposes it cannot be met even by the most extraordinary of cases. That is because, in most states that authorize the death penalty, technical "eligibility" is almost always present if a guilty verdict is entered. For example, in Louisiana, the death penalty statute lists as aggravating factors those elements of the crime that convert it from simple murder to capital murder -- e.g., the presence of aggravated arson converts simple murder to capital murder and serves as an aggravat-

ing circumstance that makes the defendant eligible for the death penalty. La. Rev. Stat. Ann. § 14:30 (West 1991); La. Code Crim. Proc. Ann. art. 905.4(a) (West 1991). In other words, in Louisiana and in many other states, by the time a jury has found the defendant guilty of the capital offense it has already found at least one of the aggravating circumstances that is a prerequisite to imposing the death penalty.[8]

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[8] Other state statutes are similar in this respect. See, e.g., Ala. Code §§ 13A-5-40, 13A-5-49(4) (1990) (murder committed during rape, robbery, burglary or kidnapping is both element of capital offense and aggravating factor creating eligibility for death sentence); Ga. Code Ann. §§ 16-7-60, 16-7-1, 17-10-30(b)(2) (Michie 1991) (same with respect to murder committed during first degree burglary or arson); Miss. Code Ann. §§ 97-3-19, 99-19-101(5) (1991) (same with respect to murder committed during robbery, rape, arson or burglary).

The crux of the sentencing process is not whether the defendant is legally eligible for the death sentence, for he or she almost always is upon conviction, but rather whether the factors that make the defendant eligible, when weighed against the other evidence, justify the death sentence. Whether a particular defendant is "innocent of the death penalty" should, therefore, turn on whether the evidence as a whole warrants such a sentence. By focusing only on technical "eligibility," the Fifth and Eleventh Circuits have made it virtually impossible for even the extraordinary case to be considered. For all practical purposes, the technical "eligibility" test slams shut the federal courthouse door, even in those rare cases where, upon consideration of the new evidence, any reasonable person would agree that the misinformed sentence

of death is excessive and unwarranted. Put differently, the "eligibility" test would effectively overrule Smith v. Murray's holding that the "actual innocence" test applies to constitutional errors at the sentencing phase.

Furthermore, a state's interest goes beyond merely preserving the finality of its criminal convictions; it must also be concerned that justice prevails. To assume that a state is interested in imposing the death penalty in every case in which the defendant is "eligible," regardless of the evidence as a whole, is to undervalue the state's concern that the death penalty be warranted in light of the unique circumstances of the individual. It is clear under Louisiana law, for example, that the state's interest is in having a jury tailor the sentence to the individual on the basis of an accurate and

complete sentencing profile that includes all relevant mitigating evidence.[9] Certainly that interest would be frustrated in deserving cases if this Court were to adopt the "eligibility" test to determine when defaulted or successive claims will be considered.

The most serious defect of the "eligibility" test is that it has the potential to create the very result it is supposed to prevent. The "eligibility" test purports to be a means of determining "actual innocence of the death penalty."

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[9] See, e.g., State v. Williams, 480 So. 2d 721, 727-28 (La. 1985) (remanding case for hearings to determine why no mitigation evidence was introduced); State v. Fuller, 454 So. 2d 119, 124 (La. 1984) (same); State ex rel. Busby v. Butler, 538 So. 2d 164, 172-73 (La. 1988) (remanding case for resentencing where no mitigation evidence was presented to jury); State v. Weiland, 505 So. 2d 702, 707 (La. 1987) (same).

The actual innocence test in turn is designed to determine whether a miscarriage of justice would occur if the claim is not considered. But, it is apparent that the eligibility test can easily result in the denial of relief in cases where all reasonable persons would agree that a miscarriage of justice may occur if a claim is not considered.

Because, in Louisiana and elsewhere, an element of the offense is often also a factor that makes the defendant eligible for the death penalty, it is easy to imagine circumstances where the minimal test for "eligibility" is satisfied but the mitigating evidence is so overwhelming that no reasonable person would impose the death penalty. Reasonable persons would agree that the failure of the federal courts to address a claim of constitutional error in such a case would result in a

miscarriage of justice. Yet the Fifth and Eleventh Circuits' "eligibility" test would produce just such a result.[10] In an effort to construct a test that is simple to administer, the Fifth and Eleventh Circuits have adopted a test so mechanical that it deprives its wellspring -- the miscarriage of justice standard -- of any effect.

Finally, the "eligibility" test is contrary to this Court's focus on the accuracy of the verdict or sentence. It is apparent from a full reading of this Court's miscarriage of justice cases that the Court's principal concern is not sim-

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10 As the dissent said in Johnson, the "eligibility" test would deny review "even if every prosecution witness at the sentencing phase lied on the stand or every statutory mitigating factor . . . was supported by actual fact but had not been presented by incompetent counsel." 938 F.2d at 1198 n.4.

ply with whether any constitutional violations occurred, but rather with whether those violations implicate the ultimate questions of guilt and the propriety of the death penalty. By focusing on whether the death penalty legally could be imposed, the court below overlooked the question of whether the sentencer's judgment to impose that awesome penalty was based upon information so fundamentally inaccurate that it produced the wrong result. Thus, this Court's precedents equating "miscarriage of justice" to "actual innocence" would be frustrated rather than furthered by the "eligibility" test.

In short, the "eligibility" test does not meet the objectives for which it supposedly is designed. The task before the Court, therefore, is to establish another test for determining "actual innocence of the death penalty" that does

prevent the miscarriage of justice while still giving due effect to other relevant considerations.

4. The "More Probable Than Not" Test Meets All Relevant Objectives.

One test that fulfills all of the relevant objectives outlined above is the "more probable than not" test proposed by the dissenters in Johnson. They described the test as follows:

> The miscarriage of justice concept permits consideration of a defaulted claim, even in the absence of a showing of "cause," where the alleged constitutional error has resulted in a factually inaccurate sentencing profile, and the inaccuracies are so significant that the result would have been different.

938 F.2d at 1200 (emphasis in original). Elaborating on the second prong of this test, Judge Anderson proposed the following:

> To further ensure that the standard is reserved for the rare case, I propose an outcome determinative standard under which the reviewing court must conclude that the factual inaccuracies were so significant that it is more likely than not that the result would have been different.

Id. (emphasis in original; footnote omitted).

This two-part approach has all the advantages that the "eligibility" rule falsely promises but none of its inherent flaws. First, and most important, the Johnson dissent's formulation is true to the substantive concept this Court has made central: the factual accuracy of sentencing decisions. Under the first prong of the test, only claims that attack the factual basis on which the sentencing decision was made would be entertained. Prisoners who raise constitutional claims that do not implicate the factual basis for the sentencing decision would be sum-

marily denied relief under the miscarriage of justice exception.[11]

Second, the Johnson dissent's proposed test is exceedingly narrow, excluding all but the most deserving of cases -- those where it could truly be said that a fundamental miscarriage of justice might occur if the claim is not reviewed. Under the second prong of the

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[11] Extremely rare cases might raise defects striking so seriously at the heart of the criminal justice system as to warrant a finding of a miscarriage of justice even if "actual innocence" is not directly implicated. See Johnson, 938 F.2d at 1198-99 n.4 (Anderson, J., dissenting) (citing example of bribery of jury); cf. Rose v. Clark, 478 U.S. 570, 577-78, 580 (1986) (some errors are "so basic to a fair trial" that they can never be harmless) (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). Whether a narrow exception should be allowed for such "structural errors" need not be decided here, however, since Sawyer's "actual innocence of the death penalty" is fully implicated by the ineffectiveness claim he raises.

"more probable than not" test, even prisoners whose claims attack the factual basis for the sentence would be denied relief if their new evidence does not significantly alter the sentencing profile. Furthermore, under the Johnson dissenters' test, it would not be enough that the change in sentencing profile is so significant that it might have changed the result, or even that there is a "reasonable probability" that it would have. Rather, the petitioner would have to demonstrate that it is more probable than not that, if the jury had heard all the reliable evidence, the death penalty would not have been imposed. Thus, miscarriage of justice relief would be reserved, as this

, Court intends, for rare cases only.[12] See, e.g., McCleskey, 111 S. Ct. at 1470.

Third, the "more probable than not" standard is familiar to the judges who would be called upon to apply it. It is already employed by federal district judges in ruling on motions for new trials based on newly discovered evidence,[13] which are rarely granted. Thus, even

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12 As Judge Anderson points out in the dissent in Johnson, the lower federal courts have been called upon in over one hundred cases since Smith v. Murray to apply the miscarriage of justice standard. Even without additional guidance from this Court in what the petitioner's burden of proof is, that standard has almost never been found to have been satisfied. See 938 F.2d at 1200 and n.5. The number of cases in which relief is granted would be even fewer if this Court should adopt the rigorous probability test proposed by the dissent in Johnson.

13 United States v. Aichele, 941 F.2d 761, 765 (9th Cir. 1991); United States v. James, 819 F.2d 674, 676 (6th Cir. 1987); McInnis v. A.M.F., Inc., 765 F.2d 240, 251 (1st Cir. 1985).

though the "more probable than not" test would require federal judges to weigh the relevant evidence,[14] it would be pursuant to a well-known and stringent test that would not impose a significant new burden on judicial resources.

Finally, the "more probable than not" formulation is so much more stringent than that which would be applied on direct

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14 It should be noted that the "eligibility" test also would not obviate the need for a federal court to weigh the relevant evidence and make a probability determination, although the need would arise less often. As articulated by the Fifth Circuit in this case, the "eligibility" test would require a federal judge to determine whether, "based on the evidence proffered plus all record evidence, [there is] a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." Sawyer, 945 F.2d at 820 (emphasis added; footnotes omitted).

appeal or in a first habeas petition that it would eliminate any incentive for prisoners or their lawyers to postpone claims for second or successive petitions. Withholding a claim for a later petition would engage a standard stringent enough to defeat all but the most compelling cases.

None of this is to say that the "more probable than not" standard is the only one that can be true to the Court's prior cases defining the concept of miscarriage of justice. Indeed, "more probable than not" is arguably inconsistent with -- i.e., more stringent than -- the "fair probability" or "colorable showing" test proposed by Judge Friendly and adopted in Kuhlmann. Conceivably the Court could fashion a probability test different from any other that has been articulated to date and still be consistent with its precedents. What commends the "more probable than not" formulation, however, is that it meets all of the Court's articulated concerns in this area, it distinguishes the test to be applied here from the "reasonable probability" test used to determine prejudice, and it imposes a standard that is familiar to and can be readily applied by district court judges.

B. This Case Is an Extraordinary One Warranting Reversal.

According to the evidence proffered by Mr. Sawyer in his second habeas petition,[15] the sentencing profile viewed by his jury was inaccurate, and fundamen-

[15] For purposes of the present proceedings, Mr. Sawyer's proffered mitigating evidence must be assumed to be true. If this Court should reverse, the case should be remanded with instructions that Mr. Sawyer be given an evidentiary hearing at which he would have the opportunity to present his proof. The state, of course, would then have the opportunity to cross-examine his witnesses and present rebuttal evidence.

tally so, in every significant respect. Mr. Sawyer's trial counsel offered only one witness -- a sister -- to provide any significant evidence regarding Mr. Sawyer's life history. That witness, Glenda White, testified that, as a child, Mr. Sawyer did not get along with his father and had a propensity for running away from home. T.R. 1486-87.[16] She also said that Mr. Sawyer "drifted around . . . from job to job" and was prevented altogether from being gainfully employed in his hometown because the local police were prejudiced against him. T.R. 1488-89. Ms. White also mentioned that Mr. Sawyer had been placed in a state mental hospital "for no

16 "T.R." references are to the trial record. "R.A." references are to the record on appeal in this habeas proceeding. These citations will be replaced with references to the Joint Appendix when it is available.

reason" and that he had been given shock treatments "as punishment." T.R. 1487.

Much of Ms. White's testimony was not accurate. Even the part that was true was not understood or appreciated by Mr. Sawyer's jury because his trial counsel failed to provide other key evidence that would have placed her testimony in its proper context. Because of trial counsel's complete failure to present a more accurate and thorough mitigation defense, Mr. Sawyer was depicted to his jury, even by his own lawyer, as a "sociopath" -- a person who plainly knows right from wrong and can control his or her behavior but who has no conscience or feelings of remorse. T.R. 1412, 1520. Mr. Sawyer's jury also was told that Mr. Sawyer likely is a sadist -- a person who derives pleasure from inflicting pain on others. T.R. 1368. This portrait of Mr.

Sawyer as a hardened criminal, deserving of no mercy, was not rebutted by Ms. White's testimony, which in fact could have been understood by the jury as corroborating the incorrect diagnosis of Mr. Sawyer as a sociopath and a sadist. A fair interpretation of Ms. White's testimony was that Mr. Sawyer disobeyed his father, engaged in criminal activities to the point of being constantly under surveillance by local police, and was unable to keep a job either because of laziness or refusal to obey the rules.

As the evidence that Mr. Sawyer has proffered in this second habeas proceeding shows, competent trial counsel would have painted a far different picture of Mr. Sawyer and placed what evidence was presented to the jury in its proper -- and far less aggravating -- context. Mr. Sawyer's true medical history is "remark-

able" because of the number of severe head injuries he has sustained. R.A. 157. At ages 5, 15, 21 and 25, he was knocked unconscious for periods ranging from 45 minutes to 2 hours. Id. At age 3 months, his mother attempted to suffocate him, possibly causing brain damage due to lack of oxygen. Id. In addition, Mr. Sawyer received three shock treatments per day for a period of a month, and these treatments also may have caused brain injury. R.A. 158. He also was severely beaten and abused physically by his father throughout his childhood. E.g., R.A. 236, 241, 246.

The result of all of these events is that Mr. Sawyer is mentally retarded and has organic brain damage as well as various other brain abnormalities. R.A. 150, 749. These problems were diagnosed as early as 1965. R.A. 210. Mr. Sawyer had been hospitalized in four men-

tal health facilities and had been adjudicated incompetent twice by the time the crime involved in this case occurred. R.A. 204-05.

Mr. Sawyer has offered expert opinion evidence that his mental defects make him unable to "inhibit and control his aggressive thoughts and actions." R.A. 159. He has "an inability or severely impaired ability to perform abstract thinking, to make generalizations or to understand abstract thinking." R.A. 153. Thus, he has no understanding of "the generalized significance of his behavior." R.A. 154.

Thus, according to the evidence presented with Mr. Sawyer's second habeas petition, he is a mentally ill and retarded individual who -- because of mental handicaps over which he has no control and for which he cannot be held responsible --

lacks the capacity to control his conduct in certain situations. It is hard to imagine that a reasonable sentencer would not feel, upon hearing this new evidence, that his or her initial decision was wholly misinformed at a minimum and probably wrong. The evidence here goes beyond that typically offered in mitigation in a competently defended sentencing-phase trial and even beyond that found in other cases to be sufficient to warrant a new sentencing trial. See, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989).[17]

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[17] In Penry, although the jury was provided evidence of the defendant's mild to moderate mental retardation, organic brain damage and child abuse, the jury was not instructed that it could consider such evidence in imposing its sentence. 492 U.S. at 328. This Court found that it was compelled to remand for resentencing to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. (citations and internal quotations omitted). In
(Footnote continued)

It is well recognized that evidence of the sort Mr. Sawyer has presented here not only reduces the moral culpability of a defendant, but "it also can significantly weaken the aggravating factors." Butler, 538 So. 2d at 173 (citations omitted). There is a belief, "long held by this society," that a defendant

(Footnote 17 continued from previous page) this case, that risk is even greater than in Penry. For example, in Penry there was no issue as to whether the defendant was competent to stand trial. Id. at 333. Here, Mr. Sawyer has presented evidence that he had been adjudicated incompetent on two prior occasions and therefore may not have been competent to stand trial. R.A. 204-05. Moreover, in Penry the jury found, even in the face of all of Penry's mitigating evidence, that he knew his conduct was wrong and that he was capable of conforming his conduct to the requirements of the law. Id. Here, no jury ever has made any such determinations with respect to Mr. Sawyer on the basis of an accurate sentencing profile, and his proffered expert testimony indicates that he did not have such capability.

who commits criminal acts that are attributable to emotional or mental problems "may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Thus, in making the decision whether to sentence a defendant to death, the courts have held that juries can be persuaded by evidence of mild or moderate mental retardation, organic brain damage and child abuse that the death penalty is inappropriate even where the underlying offense is particularly heinous.[18]

[18] Thus, for example, in Penry this Court held that evidence of mental retardation, organic brain damage, child abuse and poverty could have caused a reasonable jury to believe that the defendant did not deserve to be sentenced to death. 492 U.S. at 326. Similarly, in Brewer v. Aiken, 935 F.2d 850, 858-59 (7th Cir. 1991), the court found that there was a "reasonable probability" that the defendant would not have been sen- (Footnote continued)

Judges, like juries, also often have shown reluctance to impute to a defendant with

(Footnote 18 continued from previous page)
tenced to death if the jury had been presented with evidence of the defendant's mild retardation, tendency to be influenced by others and disadvantaged childhood. See also Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991) (finding a "reasonable probability" that the defendant would not have been sentenced to death if mitigation evidence regarding mental health had been introduced); Wilson v. Butler, 813 F.2d 664, 673 (5th Cir.) (determining that the defendant's lawyer's failure to present mitigation evidence regarding background and mental health "undermine[d]" confidence in the jury's sentence), cert. denied, 484 U.S. 1079 (1987); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (same), Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986) (same); Blake v. Kemp, 758 F.2d 523, 535 (11th Cir.) (same), cert. denied, 474 U.S. 998 (1985); Stephens v. Kemp, 846 F.2d 642, 655 (11th Cir. 1988) (same). Cf. Deutscher, 946 F.2d at 1447 (concluding on a procedurally defaulted claim that the miscarriage of justice exception applies because the defendant "probably" would not have been sentenced to death if the defendant's lawyer had presented certain evidence relating to mental disorders).

mental or psychological defects the necessary culpability to uphold a sentence of death.[19] Many legislatures, including Louisiana's, similarly have made mental disease or defect at the time of the criminal act a mitigating factor to be considered in capital sentencing proceedings.[20]

[19] See, e.g., State v Hall, 176 Neb. 295, 309-10, 125 N.W.2d 918, 926 (1964) (judge exercising statutory prerogative to "'reduce the sentence rendered . . . when in its opinion the sentence is excessive'") (citation omitted); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959) (judge vacating death sentence where sentencers failed to consider mitigating factors, including subnormal intelligence). Cf. Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984) (trial judge erred in overriding jury recommendation of life imprisonment on grounds that no mitigating circumstances existed where defendant was mentally retarded).

[20] La. Code Crim. Proc. Ann. art. 905.5(e) (West 1984); see also Ala. Code § 13A-5-51(6) (1990); Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1991); Ark. Stat. Ann. § 41-1304 (3) (Michie 1977); Cal. Penal Code Ann. § 190.3(h) (West Supp. 1991); Conn.
(Footnote continued)

The concerns that are reflected in these various objective indicia of contemporary attitudes about mentally or

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(Footnote 20 continued from previous page) Gen. Stat. § 53a-46a(g)(2) (1985); Fla. Stat. § 921.141(6)(f) (West 1990); Ind. Code § 35-50-2-9(c)(6) (1990); Ky. Rev. Stat. § 532.025(2)(b)(7) (Michie/Bobbs-Merrill 1985); Md. Ann. Code Art. 27, § 413(g)(4) (Supp. 1990); Miss. Code Ann. § 99.19-57(2)(b) (Supp. 1990); Mo. Ann. Stat. § 552.060.1 (Vernon Supp. 1990); Mont. Code Ann. § 46-18-304(4) (1991); Neb. Rev. Stat. § 29-2523(2)(g) (1990); N.H. Rev. Stat. Ann. § 630:5(VI)(a) (1990); N.M. Stat. Ann. § 31-20A-6(c) (Michie 1991); N.J. Stat. Ann. § 2C:11-3(c)(5)(d) (West 1991); N.C. Gen. Stat. § 15A-1001 (1991); Ohio Rev. Code Ann. § 2929.04(B)(3) (Anderson 1991); 42 Pa. Cons. Stat. § 9711(e)(3) (1991); S.C. Code § 16-3-20(C)(b)(6) (1990); Tenn. Code Ann. § 39-13-204(j)(8) (1991); Va. Code § 19.2-264.4(B)(iv) (1983); Wyo. Stat. § 6-2-102(j)(vi) (1991); ABA Criminal Justice Mental Health Standards 7-5.6(b) (1989). This Court has said that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Penry, 492 U.S. at 331.

psychologically impaired prisoners are particularly acute in this case. Indeed, a comparison of Mr. Sawyer's mitigation evidence with that found in cases meeting the "reasonable probability" standard shows that Mr. Sawyer's evidence, if proven at an evidentiary hearing, meets the higher "more probable than not" standard. Thus, if this Court's prior decisions regarding the mitigating effect of evidence of mental impairment are to continue to have any content at all, and if miscarriage of justice truly equates to assuring that the death sentence is the "accurate" result under all the evidence, then Mr. Sawyer must be given a hearing on his second habeas petition.

IV. CONCLUSION

For the reasons stated herein, LDF respectfully urges the Court to reverse the decision of the Court of Appeals

for the Fifth Circuit, to formulate a test for determining "actual innocence of the death penalty" that is fully consistent with the concept of miscarriage of justice, and to remand this case for an evidentiary hearing on Mr. Sawyer's evidence.

Respectfully submitted,

Julius L. Chambers
George H. Kendall
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street
New York, N.Y. 10013

Douglas G. Robinson*
Julia E. Sullivan
Skadden, Arps, Slate, Meagher & Flom
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Larry W. Yackle
Boston University School of Law
765 Commonwealth Ave.
Boston, Mass. 02215

Counsel for Amicus Curiae

*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing brief of amicus curiae NAACP Legal Defense and Educational Fund, Inc. by first-class mail, postage prepaid, upon each person listed below:

Nicholas J. Trenticosta
Loyola Death Penalty Resource Center
210 Baronne Street, Suite 608
New Orleans, Louisiana 70112
(504) 522-0578

Dorothy A. Pendergast
Assistant District Attorney
Research and Appeals
Courthouse Annex
Gretna, Louisiana 70053
(504) 368-1020

Dated at Washington, D.C. this 30th day of December, 1991.

Douglas G. Robinson

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No. 91-6382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

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QUESTIONS PRESENTED

1. Under what standard may a death sentence be a "fundamental miscarriage of justice" under *Murray* v. *Carrier*, 477 U. S. 478 (1986)?

2. Is the proper standard determined by the petitioner's eligibility for the death penalty or by reexamining the "accuracy" of his sentence?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no substantial question of whether petitioner is actually guilty.

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1. CJLF has written consent of the parties to file this brief.

Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 29, 1979, defendant and Charles Lane tortured to death Frances Arwood. The killers repeatedly beat her, scalded her with boiling water, dunked her in a bathtub, and, according to the testimony at the penalty phase, defendant "poured lighter fluid on the unconscious victim, particularly her torso and genital area, and set the lighter fluid afire." *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 203, 110 S. Ct. 2822, 2825 (1990). Defendant "told Lane that he had done this to show 'just how cruel he could be.' " *Ibid.*

On September 19, 1980, defendant was convicted and sentenced to death. His current claims were not made until the second round of habeas petitions. These claims have been rejected by the district court and the court of appeals. Pet. 3-5.

SUMMARY OF ARGUMENT

The fundamental miscarriage of justice exception to the cause and prejudice test must remain an exception and not the rule. If the exception is interpreted too broadly or subjectively, it would overwhelm the federal courts in a flood of successive petitions, and violate the integrity and the finality of state judgments.

A death penalty can be a fundamental miscarriage of justice only if defendant was not eligible for the death sentence. Eligibility is reserved for those who have committed murder with at least one statutory aggravating circumstance and whose status does not otherwise render them ineligible for the death penalty. Eligibility for the death penalty can be determined by narrow, objective criteria, thus ensuring that a fundamental miscarriage of justice remains the exception and not the rule.

While narrow and objective, the eligibility test is still fair. It preserves those rights most fundamental to the death sentencing scheme. The method for determining eligibility for the death penalty, requiring a finding of at least one statutory aggravating factor, serves the primary interests that motivated this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Preserving the status-based exemptions prevents barbarous executions from being carried out.

Defendant's alternative, by addressing the accuracy of the sentencer's finding in light of the alleged errors is fatally subjective. The sentencer is given broad access to evidence and substantial discretion to impose the death sentence. Any attempt to gauge the accuracy of the weighing of aggravating and mitigating circumstances is no more than speculation. This will in turn lead to an excessively individual interpretation of the Constitution, massive delay, and a standard too loose to protect the state's interest against successive petitions.

ARGUMENT

I. In the Penalty Phase, Fundamental Miscarriage of Justice Occurs Only When the Sentencer Cannot Legally Impose the Death Penalty.

"Justice is the end of government. It is the end of civil society. It has been and even will be pursued until it has been obtained, or until liberty be lost in the pursuit." *The Federalist No. 51*, at 324 (Madison) (Rossiter ed. 1961).

To achieve this goal, we have established an elaborate system of checks on government power. This is most evident in the criminal law. The accused criminal is entitled to an impressive variety of rights. See *Duncan* v. *Louisiana*, 391 U. S. 145, 148 (1968). The protections built into our criminal justice system help insure that the accused will be treated unjustly only in the rarest of circumstances. Cf. 4 W. Blackstone, *Commentaries* *352.

"But justice, though due to the accused, is due to the accuser also." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934). It has been over 12 years since defendant and his accomplice murdered Frances Arwood and over 11 years since his conviction. No court that has addressed the substance of his claims has accepted them. See Pet. 3-5. Yet his sentence has not been executed. This delay is the only miscarriage of justice in the present case. Accepting defendant's argument would only compound this miscarriage and eviscerate the finality of state convictions. Justice demands rejecting his arguments.

A. The Exception.

When evaluating defendant's claims, the single most important issue to keep in mind is that they either were or should have been litigated in his first round of habeas corpus. The general rule is that successive petitions must be dismissed. See Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). To preserve the rule against abusive or successive claims, any exceptions truly must be *exceptions*.

"Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1469 (1991). This is not a new problem. Since the genesis of modern habeas corpus, the fear of overwhelming the federal judiciary with habeas claims has been present. See *Brown* v. *Allen*, 344 U. S. 443, 536, n. 8 (1953) (Jackson, J., dissenting). This problem has only gotten worse since Justice Jackson's prophecy.

States bear an even heavier burden. They must bear the financial burden of defending their convictions in federal court. More importantly, habeas corpus attacks the integrity of a state's criminal justice system. Collateral attack in federal courts frustrates " 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986) (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). Perhaps the greatest burden habeas places upon a state is the lack of finality. If a prisoner is allowed unlimited attacks upon his conviction, then it never truly becomes final. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague* v. *Lane*, 489 U. S. 288, 309 (1989) (plurality). The delay inherent in habeas corpus adds another cost to the state. Retrial after a successful petition is at best difficult because of the usually long delay between conviction and successful habeas attack. "[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," prejudice the government and diminish the chances of a reliable criminal adjudication. *McCleskey*, *supra*, 113 L. Ed. 2d, at 542, 111 S. Ct., at 1468 (quoting *Kuhlmann* v. *Wilson*, 477 U. S. 436, 453 (1986) (plurality)). The cost of delay is particularly great in capital cases, as execution of the sentence cannot begin until the end of the proceedings is reached. See *Barefoot* v. *Estelle*, 463 U. S. 880, 888 (1983).

The bar against successive petitions is a guardian of these interests. If prisoners were allowed unlimited collateral attacks upon their convictions, the federal courts could grind to a halt, snowed in under a blizzard of worthless petitions. So long as they are permitted, a prisoner has nothing to lose by making multiple petitions—he has nothing better to do and he always has a chance to win. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970).

The cost of unlimited petitions is even greater for the state. If there was no control over successive petitions, then no state conviction could be considered final. Placing state convictions under perpetual federal review blocks the states' efforts to punish offenders. *Carrier*, *supra*, 477 U. S., at 487. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a state to pass laws means little if the state cannot enforce them." *McCleskey*, *supra*, 113 L. Ed. 2d, at 543, 111 S. Ct., at 1469.

As befits such an important rule, this doctrine has only two narrow exceptions. If there is cause for not raising a claim in a

prior petition and resulting prejudice, then the claim may be heard. See *McCleskey*, *supra*, 113 L. Ed. 2d, at 545, 111 S. Ct., at 1470-1471. This is a difficult standard to meet. To meet this test, any error must have "worked to [petitioner's] *actual and substantial* disadvantage, infecting his entire trial with error of constitutional dimensions." *United States* v. *Frady*, 456 U. S. 152, 170 (1982) (emphasis added). Showing cause is similarly difficult. Ineffective assistance of habeas counsel does not establish cause. See *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 670, 111 S. Ct. 2546, 2566 (1991). Something of a higher order, such as the interference of state officials or the creation of a new ground for relief subsequent to the first petition, is needed to give sufficient cause. See *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986).[2]

If petitioner cannot overcome this high hurdle, the only other exception is to prove that the error he wants reversed caused him a fundamental miscarriage of justice. See *McCleskey*, *supra*, 113 L. Ed. 2d, at 545, 111 S. Ct., at 1470. A successive petitioner who seeks to invoke this exception has already received more process than is due. He has already been convicted, the state court has affirmed his conviction on direct and collateral review, and his first habeas petition in the district court and the court of appeals has been found meritless. He now wants a federal court to take on yet another habeas petition and thwart the state's interest in finality to hear a claim that should have been made in the first petition. To justify another round of litigation, such a claim must involve matters of the utmost gravity.

This Court has recognized that a fundamental miscarriage of justice is the rarest of exceptions. The parameters to this exception were first recognized by a majority of this Court in

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2. In *Reed* v. *Ross*, 468 U. S. 1, 15 (1984), this Court found that cause could exist for novel claims. However, *Teague* v. *Lane*, *supra*, by limiting the retroactivity of new constitutional rules on habeas corpus, effectively eliminates this form of cause. See *Hopkinson* v. *Shillinger*, 888 F. 2d 1286, 1288-1289 (CA10 1989).

Murray v. *Carrier*, 477 U. S. 478, 481-482 (1986), where petitioner attempted to overturn his rape conviction on federal habeas corpus through a procedurally defaulted claim. The *Carrier* Court here recognized one last possibility if petitioner could not show cause and prejudice.

> "Accordingly, we think that *in an extraordinary case*, where a constitutional violation has probably resulted in the conviction of one who is *actually innocent*, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*, at 496 (emphasis added).

This exception has never been given a more precise definition by this Court. Nonetheless, one theme has remained consistent throughout this Court's analysis of this exception. This innocence exception is rare, and shall be granted only in the most extraordinary circumstances. See *Dugger* v. *Adams*, 489 U. S. 401, 411, n. 6 (1989); *Smith* v. *Murray*, 477 U. S. 527, 537 (1986); *McCleskey*, *supra*, 113 L. Ed. 2d, at 550, 111 S. Ct., at 1474-1475; *Kuhlmann*, *supra*, 477 U. S., at 454.

The rarity of this exception reflects both the need to limit successive petitions and the reality that few such petitions involve a truly fundamental miscarriage of justice. Our system is designed to protect the accused from an unjust conviction. It is the extremely rare case that makes it through all the hurdles to get to a successive habeas petition and involve a fundamental miscarriage of justice.[3]

The prohibition against successive petitions plays a key role in preventing the federal courts from perpetually reviewing

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3. One of the most respected federal judges estimated that in 11 years on the bench he had seen at most half a dozen cases where he "entertained a real doubt about a defendant's guilt." Friendly, *supra*, 38 U. Chi. L. Rev., at 160, n. 94.

state convictions.[4] If, however, the injustice exception is given too broad a definition, it would swallow the general rule against successive petitions. This Court has recognized this threat and thus has proceeded with due caution in interpreting this exception. See *Adams*, *supra*, 489 U. S., at 411, n. 6. "We adopt this standard [fundamental miscarriage of justice] now to effectuate the clear intent of *Congress* that successive federal habeas review should be granted only in *rare* cases." *Kuhlmann*, *supra*, 477 U. S., at 454 (emphasis added) (plurality). Therefore, any definition of the standard enunciated in *Carrier* must be narrowly drawn to prevent the injustice that would follow from too many successive petitions. Allowing a successive petition under the fundamental miscarriage of justice standard must be the *exception* and not the rule.

B. The Need for a Standard.

This case comes to this Court because of the difficulty of reconciling innocence with the death penalty. Attacking the justice of a death sentence concedes defendant's guilt of the murder.[5] Innocence is defined as "[t]he absence of guilt." Black's Law Dictionary 708 (5th ed. 1979). This Court has recognized the incongruity of the concept of innocence of the death penalty. "We acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial of a capital offense." *Smith* v. *Murray*, 477 U. S. 527, 537 (1986). The difficulty of reconciling innocence and the death penalty has also bedeviled the circuit courts. See *Johnson* v. *Singletary*, 938 F. 2d 1166, 1176 (CA11 1991) (en banc).

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4. The cause and prejudice standard is also used to excuse procedural default in habeas cases. See *Carrier*, *supra*, 477 U. S., at 487. Therefore, any definition of what constitutes a fundamental miscarriage of justice will also affect this important doctrine.

5. It would be possible to attack in the alternative the injustice of the underlying conviction and that of the penalty. Any attack on the penalty, however, presumes that any attack based upon innocence of the crime has failed.

The better way to address this problem is by returning to the roots of the innocence exception. The innocence exception came from the principle that " '[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray* v. *Carrier*, 477 U. S. 478, 495 (1986) (quoting *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982)).

While it is difficult to comprehend a person being guilty of a crime and innocent of a sentence, it is possible to understand a guilty person's sentence as being a fundamental miscarriage of justice. The inherent subjectivity of "injustice," however, calls for caution.

> " '[I]t is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts.' " *McCleskey*, *supra*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471 (quoting *Brown* v. *Allen*, 344 U. S. 443, 501-502 (1953) (opinion of Frankfurter, J.)).

This Court must provide the lower federal courts with some rule to guide their discretion in determining what is a fundamental miscarriage of justice. It is not enough to say, "I know it when I see it." See *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (Stewart, J., concurring). We need "a sound and workable means of channeling the discretion of federal habeas courts." *Carrier*, *supra*, 477 U. S., at 497. In order to establish a standard for when penalty phase error is fundamentally unjust, it will be necessary to examine how the penalty phase operates and its purpose. Once the penalty phase is understood, a standard of justice may be developed.

C. The Death Penalty.

Before *Furman* v. *Georgia*, 408 U. S. 238 (1972), the death penalty was subject to little more constitutional regulation than any other aspect of criminal procedure. In most states, no more than a first degree murder conviction was needed to impose capital punishment. See *McGautha* v. *California*, 402 U. S. 183, 198 (1971). Some states allowed lesser crimes to be punished by death. See, *e.g.*, *Powell* v. *Alabama*, 287 U. S. 45, 50 (1932). One reform that had been adopted to mitigate harshness in the system was to allow the jury to determine whether the sentence would be death or life imprisonment. *McGautha*, *supra*, 482 U. S., at 200. This Court had approved giving the jury unfettered and absolute discretion in sentencing. *Andres* v. *United States*, 333 U. S. 740 (1948).

This world was swept away with this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). *Furman* found that there was something wrong with the nation's death penalty system, but neither explained what exactly was wrong or how to remedy it. While five justices agreed to vacate the sentences, none could agree on the reasons. Two Justices would have abolished capital punishment. *Furman*, *supra*, 408 U. S., at 305 (Brennan, J., concurring); *id.*, at 369 (Marshall, J., concurring). Two opinions expressed the belief that the penalty was imposed rarely and the statutes in question provided no principled means for determining who should and should not receive the death sentence. *Id.*, at 309-310 (Stewart, J., concurring); *id.*, at 311-12 (White, J., concurring). Justice Stewart indicated that a mandatory sentencing scheme that eliminated jury discretion would pass constitutional muster. *Id.*, at 307-308 (Stewart, J., concurring). One Justice felt that the death penalty was imposed in a discriminatory manner. *Id.*, at 242-243 (Douglas, J., concurring).

The state legislatures reacted quickly to this legal firestorm. Unfortunately, without a majority opinion, they had no guidance for their reforms. Some states chose to eliminate the jury's discretion to sentence, while others chose guided discretion statutes that defined certain aggravating and mitigating standards. See *Johnson*, *supra*, 938 F. 2d, at 1179; Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 W. St. L. Rev. 95, 107-108 (1987).

This Court chose guided discretion. In order to placate the fears voiced by Justices White and Stewart in *Furman*, some guidance had to be given to the jury in order to prevent the death penalty from being arbitrarily imposed. "*Furman* mandates, . . . that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (plurality).

While guidance was necessary, it was not total. A discretionless death penalty was seen as encouraging widespread jury nullification, *Woodson* v. *North Carolina*, 428 U. S. 280, 291-296 (1976) (plurality), and had been chosen only due to a misplaced reliance on *Furman*, *Woodson*, *supra*, at 298-299. Most importantly, the *Woodson* Court came to the previously unknown realization that individualized consideration of each death sentence was a "constitutional imperative." In addition to examining the crime, the jury must also look to "the character and record of the individual offender." See *id.*, at 303-305.

Gregg and *Woodson* and the cases interpreting them have become the Scylla and Charybdis of capital punishment. A death sentence is valid only if the state limits the sentencer's discretion, but not so much as to infringe upon the newly invented constitutional imperative of *Woodson*.

These two lines of authority protect different interests in different ways. The guidance requirement of *Gregg* is concrete. One constant in this Court's post-*Furman* death penalty jurisprudence has been the need to limit the sentencer's discretion. See *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 532-533, 110 S. Ct. 3047, 3060-3061 (1991) (Scalia, J., concurring). The standard established is relatively straightforward for the states to follow and for the courts to administer. States must provide the sentencer with " 'clear and objective standards' that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (footnotes omitted). The ease of complying with this is demon-

strated by the fact that since *Furman* this Court has reversed a death sentence for excessive discretion only twice. See *Walton*, *supra*, 111 L. Ed. 2d, at 533, 110 S. Ct., at 3061 (Scalia, J., concurring).[6]

The fact that the states have been able to follow the guidance standard does not undermine its importance. The guidance requirement evolved as a means with dealing with the problems of arbitrariness that so heavily influences the *Furman* decision. A jury can no longer impose the death penalty at its whim. It must now find a reason to separate defendant from those murderers for whom death is not warranted. It must do so pursuant to standards established by the state that provide clear and specific guidance. See *Godfrey*, *supra*, 446 U. S., at 428. There is little wonder that this Court considers the need for a guidance to be a "fundamental constitutional requirement." *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988).

The individual sentencing requirement developed in *Woodson* is a very different sort of right. The quest to make each death sentence individual has moved the death penalty towards its pre-*Furman* state. The sentencer can "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (emphasis in original) (plurality); see *Sumner* v. *Shuman*, 483 U. S. 66, 75-76 (1987). The sentencer "may not be precluded from giving effect to all mitigating evidence." See *McKoy* v. *North Carolina*, 108 L. Ed. 2d 369, 377-378, 110 S. Ct. 1227, 1230-1231 (1990).

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6. The *Walton* concurrence cites *Maynard* v. *Cartwright*, 486 U. S. 356, 362-364 (1988) and *Godfrey*, *supra*, 446 U. S., at 428-429 as the two reversals by this Court due to excessive discretion. *Walton*, *supra*, 111 L. Ed. 2d, at 533, 110 S. Ct., at 3061. It is arguable that this Court reversed a third death penalty for excessive discretion in *Clemont* v. *Mississippi*, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990).

Guided discretion and individual sentencing are not the only limits this Court has placed on capital punishment. Only certain people who have committed certain crimes may be sentenced to death. Thus a rape conviction may not serve as the basis for a death sentence. *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality). Minor participation in a felony underlying felony murder, barring a finding that defendant exhibited a reckless disregard for life, will not support capital punishment. *Tison* v. *Arizona*, 481 U. S. 137, 157-158 (1987). It is also probable that persons under 16 may not be sentenced to death unless the Legislature clearly sets out a lower minimum age. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 857-858 (1988) (O'Connor, J., concurring). A person may not be executed so long as he is insane, *Ford* v. *Wainwright*, 477 U. S. 399, 408 (1986), nor is it likely that the severely or profoundly retarded may be executed, see *Penry* v. *Lynaugh*, 492 U. S. 302, 333 (1989).

These rights accrue to the defendant not because of a particular need to manage the death penalty process, but because of the fundamental injustice of executing a person who fits one of these particular exceptions. In these cases, death is inappropriate because "the objective indicia of community values have demonstrated a consensus that the death penalty is disproportionate as applied to a certain class of cases . . . ." *McCleskey* v. *Kemp*, 481 U. S. 279, 305 (1987).

Current death penalty law may be summarized as thus: A person may not be sentenced to death unless convicted of murder[7] and unless the class of death-eligible murders is somehow objectively narrowed. This is typically done by finding at least one statutory aggravating circumstance. Once defendant is convicted of this crime, the sentencer has broad discretion, being able to hear any mitigating evidence. This discretion is broadened by the fact that the jury may also hear aggravating evidence beyond the statutory aggravating circum-

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7. At least among the common crimes murder is the only capital offense. But see 18 U. S. C. § 794 (espionage); *id.*, § 2381 (treason).

stances. See *Barclay* v. *Florida*, 463 U. S. 939, 947 (1983). The sentencer then weighs the aggravating and mitigating facts and decides whether death or life imprisonment is appropriate. These roles and functions are important to determining what penalty phase error constitutes a fundamental miscarriage of justice.

D. The Eligibility Standard.

What constitutes a fundamental miscarriage of justice in the penalty phase can be determined only after applying several important principles. Whatever standard is enunciated, it must insure that the innocence exception remains an exception. Making the exception too broad would swallow up the rule against successive petitions, causing considerable harm to the state and the federal judiciary. See *ante*, at 4-8. Therefore, any rule enunciated by this Court must be sufficiently narrow to preserve the prohibition against successive petitions.

In addition to being narrow, the standard must also be workable.

> "A workable definition [of the miscarriage of justice exception] is essential to our jurisprudence because we are often faced with procedurally-defaulted claims, and many petitioners claim they meet this exception. It is crucial that we know when to apply the second exception, so as to limit our interference with the states' criminal justice systems and promote finality while simultaneously recognizing the truly extraordinary case in which a petitioner's claim must be reviewed . . . in order to avoid a fundamental miscarriage of justice." *Johnson*, *supra*, 938 F. 2d, at 1176.

The state and the federal courts are not the only ones protected by a narrow, workable standard. The truly deserving claimants are best served by the highest, most objective standard reasonable. If the standard is perceived as being too broad, then the federal courts will become flooded with successive petitions proclaiming the injustice of each petitioner's death sentence. "It must prejudice the occasional meritorious

application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the judgment). Opening the doors too wide risks getting some of the few truly worthy petitions lost in the ensuing stampede.

These concerns were paramount in this Court's decision to adopt the cause and prejudice standard for successive petitions in *McCleskey*. "Considerations of certainty and stability in our discharge of the judicial function . . . " led to the adoption of the cause and prejudice standard. See *McCleskey*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. It was well-defined, objective, and provided " 'a sound and workable means of channeling the discretion of federal habeas courts.' " *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471 (quoting *Carrier*, *supra*, 477 U. S., at 497). It also was prone to uniform application. *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. Finally, this Court adopted the cause and prejudice standard in order to "curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process." *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471.

Any standard enunciated for the sole exception to the cause and prejudice test must guard these same interests. If it does not discourage successive petitions, if it is not objective, if it cannot be applied uniformly by the federal courts, then the cause and prejudice standard will fail in its purpose. This will turn the prohibitions against procedurally defaulted claims and successive petitions into empty husks.

A standard for determining whether a penalty phase error is a fundamental miscarriage of justice that comports with the principles of *McCleskey* and has been developed. In order for penalty phase error to constitute a fundamental miscarriage of justice, it must go to the authority of the sentencer to impose the death penalty. "In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson*, *supra*, 938 F. 2d, at 1183 (emphasis in original). This standard, formulated by the Eleventh Circuit in *Johnson* and adopted by the Fifth Circuit in the present case, *Sawyer* v. *Whitley*, 945 F. 2d 812,

820 (CA5 1991), provides an objective and understandable standard that limits successive petitions yet preserves the fundamental rights in the penalty phase.

A defendant must have three findings made against him before being sentenced to death. First, he must be convicted of murder. Second, the finder of fact must determine that some narrowing fact is true. Third, the sentencer must weigh all mitigating and aggravating evidence and decide the appropriate sentence.[8]

Of the three findings, the first goes to the actual innocence of the crime, whether the defendant actually committed the murder. The eligibility standard for miscarriage of justice addresses the second finding made in the capital punishment process. A person *may not* be executed unless the sentencer's discretion is limited. The method used to limit this discretion is to require a finding that the murder was statutorily aggravated. See *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988). Error in the third finding, the weighing of aggravating and mitigating circumstances, would not come within this standard, however. Once it is determined that a habeas petitioner is constitutionally eligible for the death penalty, federal habeas courts may not use the miscarriage of justice standard to reweigh the aggravating and mitigating factors.

Limiting the miscarriage of justice standard to eligibility provides the necessary objective standard. One either is or is not eligible for the death penalty. Eligibility-based attacks will be limited to two groups. First, a sentence may be attacked as unjust on the grounds that the sentencer's discretion was insufficiently limited. Either the sole statutory aggravating factor that made the murder "capital" provides insufficient guidance to the sentencer, cf. *Zant* v. *Stephens*, 462 U. S. 862, 882-884 (1983), or the petitioner may proclaim his innocence of all of those factors that made his murder capital. The second way of attacking eligibility is through the defendant's status. If, as a matter of constitutional law, defendant's status makes him ineligible for the death penalty, then he may invoke the fundamental miscarriage of justice exception. Thus, if a person is insane, *Ford*, *supra*, 477 U. S., at 408; or committed a crime not severe enough to warrant the death penalty, *Coker*, *supra*, 433 U. S., at 592; or complains of *Tison* error, *Tison*, *supra*, 481 U. S., at 157-158; or is less than 16 and the state has not specified a lower age requirement for the death penalty, see *Thompson*, *supra*, 487 U. S., at 857-858 (O'Connor, J., concurring); or is severely mentally retarded, see *Penry*, *supra*, 492 U. S., at 312, then he may claim that his death sentence is a fundamental miscarriage of justice.

Finding such errors do not place an excessive burden on the federal courts. Whether a defendant's status renders him ineligible for the death penalty involves answering the relatively simple question of whether defendant's claim fits one of the narrow exceptions to death penalty eligibility that this Court has carved out. An attack on the necessary aggravation involves similarly straightforward issues. If petitioner disputes that he committed the necessary aggravating acts, he is claiming that he is "innocent"of those particular acts. A person who cannot be sentenced to death because he did not commit the necessary aggravating acts is truly "innocent" of the death penalty.

An attack on the constitutionality of a statutory aggravating factor is also relatively straightforward and objective. The purpose behind the guidance requirement is to place an "inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, *supra*, 446 U. S., at 428. There must be a "principled way to distinguish" between the imposition of the death penalty in one case involving the suspect circumstance and the failure to impose it in another. See *id.*, at 433. While the pursuit of objectivity and precision in aggravating circumstances does not guarantee objectively decided

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8. Not every state requires these three findings to be made separately. In California, for example, the jury makes the initial finding of guilt of the underlying crime and the necessary statutory aggravating factor at the same time, except for the prior murder circumstance. See Cal. Penal Code § 190.1(a)(1). Next comes the sentencing phase where the jury weighs the aggravating and mitigating factors and decides whether death is appropriate. *Id.*, § 190.3. Nonetheless, the three findings are made.

issues, it is a step in that direction. Ascertaining whether an aggravating circumstance provides sufficient guidance is a matter of statutory interpretation, a task courts have much practice with. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947). Furthermore, the necessary interpretation is not particularly difficult. A court does not have to determine the exact meaning of a statute, it only has to know whether the statute was sufficiently precise to channel the jury's discretion to impose the death sentence. See *Cartwright*, *supra*, 486 U. S., at 363. Finally, any difficulty a federal court may have in interpreting a particular statute may be alleviated by this Court's substantial case law on the need for statutory aggravating circumstances. Cf. *Walton*, *supra*, 111 L. Ed. 2d, at 532-533; 110 S. Ct., at 3060-3061 (Scalia, J., concurring) (listing decisions of this Court on the need to channel the sentencer's discretion).

The precision and objectivity of the eligibility exception help to insure that it remains the exception and not the rule. This Court's decisions on what status makes a person ineligible for capital punishment are well-defined and easy for the states to follow. Similarly, aggravating circumstances are rarely found improper. See *ante*, at 12. Finally, any attack on the truth of a particular statutory circumstance is no more than a claim of "innocence" with respect to that circumstance. Such a claim should be as rare as the actual innocence exception. See *Carrier*, *supra*, 477 U. S., at 496.

Although narrow, the eligibility exception is not unjust. It embraces those cases where the death penalty is wrong as a matter of law. It excludes those cases where the propriety of the sentence is a matter of opinion.

The modern revolution in death penalty jurisprudence derives from this Court's decision in *Furman*. The opinions in *Furman* were motivated by three reasons for dissatisfaction with the death penalty. One reason, that capital punishment is inherently cruel and unusual, *Furman*, *supra*, 408 U. S., at 305 (Brennan, J., concurring); *id.*, at 369 (Marshall, J., concurring) has been explicitly rejected by this Court. See *Gregg*, *supra*, 428 U. S., at 187. The other two attacks on capital punishment

that the death penalty was imposed arbitrarily, see *Furman*, *supra*, at 309-310 (Stewart, J., concurring); *id.*, at 311-312 (White, J., concurring), and that it was imposed in a discriminatory manner, see *id.*, at 255-256 (Douglas, J., concurring), are dealt with at the eligibility stage of the capital punishment determination.

The requirement that a person is not eligible for the death sentence until a proper finding of statutory aggravation is made was a direct response to *Furman*'s concern with the arbitrariness of the penalty. See *ante*, at 10-12. By forcing the jury to find some particular aggravation, this requirement narrows the jury's discretion to impose the death penalty and thus avoids the arbitrariness attacked in *Furman*.

The aggravation requirement also helps address Justice Douglas' concern with discriminatory application. "Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Furman*, *supra*, 408 U. S., at 255 (Douglas, J., concurring). Statutory aggravating circumstances, by channeling the jury's discretion to impose the death sentence, lessens discrimination in the death penalty. Capital punishment is reserved for the most deserving, while preventing the common murderer from being given a death sentence for discriminatory reasons. See *Gregg*, *supra*, 428 U. S., at 197-198. As the guidance requirement resolves the two legitimate complaints with capital punishment from *Furman*, there is little wonder that this right is "fundamental," see *Cartwright*, *supra*, 486 U. S., at 362, and thus within the miscarriage of justice exception to successive habeas petitions.

The status protection of the eligibility test is similarly fundamental. While rape is a serious crime, death is a "grossly disproportionate and excessive punishment . . . ." *Coker*, *supra*, 433 U. S., at 592. Giving the death sentence to the minor participant in the underlying felony in a felony murder case is similarly extreme, and thus juries have almost always refused

to impose the death penalty in such circumstances. See *Enmund* v. *Florida*, 458 U. S. 782, 795-796 (1982). Executing the insane was considered barbarous before Blackstone's time and has always been prohibited in this country. See *Ford*, *supra*, 477 U. S., at 406-409.

Along with supplying a proper standard to define a fundamental miscarriage of justice, the eligibility test also follows this Court's scant authority in this field. The interests the eligibility test protects, narrowness, objectivity, and ease of application, are the same interests protected by the miscarriage of justice standard. The miscarriage of justice exception is supposed to be invoked only rarely. "We remain confident that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' " *Carrier*, *supra*, 477 U. S., at 495-496 (quoting *Engle*, *supra*, 456 U. S., at 135). Keeping the test for injustice narrow and objective insures that the " 'extraordinary case' " of injustice is not turned "into an all too ordinary one." *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989).

This Court has addressed the issue of fundamental miscarriage of justice in the sentencing phase of a capital case two times. In *Smith* v. *Murray*, 477 U. S. 527, 529-530 (1986), the alleged error had to do with defendant's admission of prior misconduct during a psychiatric interview arranged by his own attorney. The *Smith* Court concluded that admitting this evidence "did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat of society." *Id.*, at 538 (emphasis in original). Therefore, refusing to consider this procedurally defaulted claim on federal habeas corpus was not a fundamental miscarriage of justice. *Ibid.*

The intended emphasis of this statement appears to be on the jury's reaching an acceptable result based on all the information available, even though some of that information may have been illegally obtained. Cf. Friendly, *supra*, 38 U. Chi. L. Rev., at 160. It does not contradict the eligibility test. In Virginia a jury must find at least one aggravating circumstance before it may recommend a death sentence. See

Va. Code § 19.2-264.2 The alleged error in *Smith* went to the validity of one of these circumstances, whether defendant "constituted a continuing serious threat to society." See *ibid.* By finding that the testimony did not render Smith "innocent" of one of the aggravating circumstances found against him, this Court kept its analysis of the miscarriage of justice standard to the defendant's eligibility for the death penalty.

Defendant argues that if eligibility were the test for the miscarriage of justice exception, then the *Smith* Court could have dismissed the claim on the grounds that one of the aggravating grounds was valid and therefore defendant was eligible for the death penalty. Pet. Brief 21, n. 28. But one reason this Court took the case was to decide whether the Court of Appeals properly applied *Zant* v. *Stephens*, 462 U. S. 862 (1983) to the psychiatric evidence under attack *Smith*, *supra*, 477 U. S., at 528-529. The *Smith* majority did not specify what part of *Zant* it wanted to analyze. The dissent, written by the author of *Zant*, felt that the Court of Appeals improperly applied *Zant* when it upheld the death sentence in spite of one of the two aggravating circumstances being invalid. *Smith*, *supra*, 477 U. S., at 554 (Stevens, J., dissenting).

Therefore, contrary to defendant's claim in the present case, invalidating the "continuing threat" circumstance could have invalidated the death sentence in *Smith*. While a majority of the Court may have found that under *Zant* the death penalty was valid after invalidating one of the circumstances, the *Smith* majority avoided deciding this constitutional question by assuring itself that both aggravating circumstances were valid. Thus the *Smith* Court did find that Smith was eligible for the death penalty when it found his sentence was not a fundamental miscarriage of justice.

The reference in *Smith* to perverting the jury's deliberations, however, might be construed to open up any claim of procedural error in instructing the jury, selecting the jury, arguing to the jury, or admitting evidence to the jury. This interpretation was adopted by the dissent in the other case dealing with "miscarriage of justice" in the penalty phase: *Dugger* v. *Adams*, *supra*. In *Adams*, defendant was sentenced

to death for molesting and murdering an eight-year-old girl. 489 U. S., at 404, n. 2. The trial court instructed the jury that their recommendation was only advisory. *Id.*, at 440. The dissent claimed that the "alleged error is thus global in scope: it necessarily pervades the entire sentencing process." *Id.*, at 423 (Blackmun, J., dissenting).

The majority refused to adopt this process-based approach to the fundamental miscarriage of justice standard.

> "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' *Carrier*, *supra*, at 496, into an all too ordinary one." *Id.*, at 411.

In *Smith*, this Court was willing to analyze error under the miscarriage of justice standard to the extent that it undermined defendant's eligibility for the death penalty. In *Adams*, process-based attacks on the accuracy of the decision to sentence defendant to death did not invoke this exception. Therefore, once a defendant is deemed eligible for the death penalty, any error unrelated to his eligibility for his sentence is not a fundamental miscarriage of justice.

At the guilt phase, innocence is the test for the fundamental miscarriage of justice. See *Carrier*, *supra*, 477 U. S., at 496. It is unjust because *everybody* believes sending an innocent person into prison is unjust. The same consensus is not present for the properly convicted capital murderer. The decision that defendant has committed sufficiently aggravated murder renders a death sentence proportionate to the crime committed. See *Pulley* v. *Harris*, 465 U. S. 37, 50 (1984). Once a person is convicted of this crime, a person can, and often times will, be sentenced to death. The overwhelming majority of Americans favor capital punishment for murder. U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice*

Statistics — 1988, at 223. The vast majority of states have recognized this sentiment and enacted statutes providing for the death penalty for aggravated murder. U. S. Bureau of Justice Statistics, *Capital Punishment 1990*, at 1.

The extensive set of constitutional eligibility restrictions, *ante*, at 13, combined with the state statutory system, defines which murderers are death-eligible. If the defendant is *in fact* a murderer, if his crime does *in fact* fit the state's definition of a capital offense, and if neither he nor his crime *in fact* comes within any of the ineligible classes, then death is an authorized sentence which our society has determined to be not cruel and not grossly disproportionate. This detailed and exhaustive body of law, built up so painfully over so many years, has identified and excluded those cases where a death sentence would be a fundamental miscarriage of justice. The remainder of cases are those where reasonable people may differ as to whether death is the appropriate punishment. If a particularly hard-nosed sentencer could legitimately impose the sentence following an absolutely perfect trial and sentencing hearing, then that sentence is not a fundamental miscarriage of justice.

The Fifth Circuit, applying an eligibility test, properly found that defendant was eligible for the death penalty in that he did commit capital murder, and thus his sentence was not a fundamental miscarriage of justice. *Sawyer* v. *Whitley*, 945 F. 2d 812, 823-825 (CA5 1991). Giving the court of appeals eligibility finding its proper deference, cf. *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983) (findings of state law), defendant's case presents ample evidence for the justice of his sentence. The court of appeals found that defendant was guilty of aggravated arson. *Id.*, at 824-825, and n. 22. In light of the horrific circumstances of the killing, death cannot be a fundamentally unjust punishment.

II. Defendant's proposed standard is inappropriate.

Defendant wants a much broader and more subjective standard. He would call a fundamental miscarriage of justice any death sentence where the alleged error led to the admis-

sion of false evidence or the preclusion of true evidence that led to "a probability that the jury would not have imposed death." Pet. Brief 19. Defendant would attack the accuracy of the death sentence in light of the alleged errors.[9] " 'The miscarriage of justice concept permits consideration of a defaulted claim, even in the absence of a showing of 'cause' where the alleged constitutional error has resulted in a *factually inaccurate sentencing profile* . . . .' " Pet. Brief 15, n. 21 (quoting *Johnson* v. *Singletary*, 938 F. 2d 1166, 1200 (CA11 1991) (en banc) (Anderson, J., dissenting) (emphasis added)).

This standard would declare open season on the death penalty. By allowing federal courts to focus on the *accuracy* of the sentencer's decision to impose death, defendant would plunge federal courts into perpetual review of the original decision to impose death. It is a hopelessly subjective standard that will amount to no more than speculating as to what the sentencer would actually do if the alleged error had not been made. Such a standard is also too broad, allowing too many unworthy claims to be heard by federal courts. The result would be an exception that would swallow the rule against successive petitions and procedurally defaulted claims and allow federal courts to create an individualized interpretation of the Constitution for death penalty petitioners.

Defendant's first problem is with this Court's own precedents. He draws the true and false facts standards from *Smith* v. *Murray*, 477 U. S. 527, 538 (1986). This use of *Smith* makes too much out of what is at best dicta. The alleged error in *Smith* went to a statutory aggravating circumstance which

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9. Defendant also alleges that the State suppressed exculpatory evidence regarding his guilt of first degree murder. Pet. Brief 47-50. Yet this claim, if true, does not require an innocence exception. State concealment of evidence is cause under the cause and prejudice test. *Amadeo* v. *Zant*, 486 U. S. 214, 222 (1988). This demonstrates the *Carrier* Court's observation that most miscarriage of justice cases will satisfy the cause and prejudice test. *Carrier*, *supra*, 477 U. S., at 495-496. Defendant's standard, by focusing on factual accuracy in the sentencing process, is unnecessary.

determined whether defendant was *eligible* for the death penalty. See *ante*, at 20-22. Attacking the accuracy of the jury's decision has been rejected by this Court. "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." *Dugger* v. *Adams*, 489 U. S. 401, 412 (1989).

Defendant's standard is drawn to avoid direct conflict with *Adams*. *Adams* involved allegedly incorrect jury instructions. *Id.*, at 403. By sticking to the facts, defendant thus does not directly contradict the precise holding of *Adams*. His standard is nonetheless contrary to underlying rationale of *Adams*. Jury instructions, while not facts, can be more crucial to the accuracy of a death sentence. In *Adams*, the instruction arguably violated this Court's decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). *Adams*, *supra*, 489 U. S., at 402-403.[10] The jury instructions in *Adams* told the jury that it was not responsible for imposing the death sentence. Instead, it was the judiciary that bore the ultimate burden. *Id.*, at 403. In *Caldwell*, the prosecution made a similar argument to the sentencing jury. *Caldwell*, *supra*, 472 U. S., at 325-326. The *Caldwell* Court excoriated this argument for the improper influence it would have on the jury's decision to impose the death sentence. See *id.*, at 332.

The *Adams* Court chose wisely when it refused to delve into the accuracy of the death sentence. Ascertaining the effect of a piece of evidence on the accuracy of jury's discretion is always difficult. Only a mind reader can truly ascertain what effect an item of evidence would have on a verdict.

In reviewing a guilty verdict, a court has some guidelines. The admissibility and use of evidence is typically heavily regulated. Most importantly, to convict someone of a crime, a jury

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10. We say "arguably" because of differences in the Florida and Mississippi sentencing systems. See *id.*, at 403, n. 1.

has to find beyond a reasonable doubt that the accused committed the crime. *In re Winship*, 397 U. S. 358, 364 (1970).

The sentencing jury's decision in a capital case is much more subjective. There is no limit on what relevant mitigating evidence may be admitted. See *Lockett* v. *Ohio*, 438 U. S. 586, 604-605 (1978) while the state may channel the jury's discretion regarding the weighing process, see *Blystone* v. *Pennsylvania*, 108 L. Ed. 2d 255, 263, 110 S. Ct. 1078, 1082 (1990), the sentencing jury still retains considerable discretion over whether to impose the death sentence, cf. *McKoy* v. *North Carolina*, 108 L. Ed. 2d 369, 377-378, 110 S. Ct. 1227, 1230-1231 (1990) (sentencer must be allowed to give effect to all mitigating evidence). The sentencing jury is given this wide access to evidence and broad discretion in order to insure that the sentencing process is individualized to each particular defendant. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304-305 (1976) (plurality).

Once the jury has found the necessary statutory aggravating circumstance, any disagreement over whether to impose the death penalty is no more than a matter of opinion. The narrowing process that goes on in order to make defendant eligible for the death penalty eliminates the truly undeserving from consideration for the death penalty. See *ante*, at 22-23. Of those defendants eligible for the death penalty, at least some people will agree that the death sentence is proper. See *ante*, at 23. Thus, when reviewing the "accuracy" of a death sentence, a federal court can do no more than second-guess the sentencing jury. It will have to reweigh the aggravating and mitigating factors itself.

In *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980), this Court condemned the imposition of the death penalty where the only statutory aggravation was that the murder was "outrageously or wantonly vile, horrible and inhuman." As the trial judge gave no instruction on the meaning of this statute, the jury's interpretation of it could "only be the subject of sheer speculation." *Id.*, at 429. The federal habeas judge reviewing the effect of new evidence on the accuracy of the sentencing jury's decision will be forced to engage in the same type of speculation. "The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. *It is not surprising that such collective judgments are often difficult to explain.*" *McCleskey* v. *Kemp*, 481 U. S. 279, 311 (1987) (emphasis added).

The *Johnson* Court noted the difficulty of this decision.

> "When a defendant is eligible for the death penalty . . . , it is nearly impossible to determine that the sentencing body's ultimate conclusion that imprisonment is more appropriate than the death penalty (or *vice versa*) is 'correct' or 'accurate' or 'incorrect' or 'inaccurate.' " *Johnson*, *supra*, 938 F. 2d, at 1183-1184.

The only alternative to speculating on whether the sentencer would have imposed death had the alleged error not been made is for the federal court to determine for itself whether a death sentence was accurate. It could take the call for accuracy to heart and decide for itself whether the defendant before it *should* be sentenced to death in light of all the aggravating and mitigating evidence. While a federal court may examine the rationality of a state jury's verdict, it cannot substitute its own judgment for that of the jury. See *Jackson* v. *Virginia*, 443 U. S. 307, 318-319 (1979).

Defendant claims federal courts are used to making this type of determination. Citing *Strickland* v. *Washington*, 466 U. S. 668 (1984), he notes that this Court has developed standards for dealing with the effect of errors on the sentencer's balancing of aggravating and mitigating factors. Pet. Brief 30-31. The standard defendant wishes to import from *Strickland* is too broad to provide an accurate definition of a fundamental miscarriage of justice. What the *Strickland* Court said was that "the question is *whether there is a reasonable probability* that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, *supra*, 466 U. S., at 695 (emphasis added).

This standard was developed for claims properly before a federal court. Hearing a successive petition should be an exception and not the rule. Defendant's test would eliminate the bar against successive petitions for claims alleging ineffective assistance of counsel involving the improper admission of or failure to submit evidence at the sentencing phase.

Such claims regarding counsel are not unusual. Federal courts are frequently presented with the claim that a death sentence was the result of ineffective assistance of counsel. See *Johnson*, *supra*, 938 F. 2d, at 1185. Attorneys cannot look into every possible line of inquiry. See *Strickland*, *supra*, 466 U. S., at 691. While error is not likely, given the fact that any relevant mitigating evidence may be submitted to the sentencer, failure to follow a particular line always could be an error. Thus most capital cases will present claims of *Strickland* error that could come within defendant's proposed standard. Adopting such a standard will only encourage the sandbagging that is the bane of federal habeas corpus. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 89 (1977). Furthermore, defendant wants to go beyond *Strickland*. Ultimately, he wants the federal courts to assess the *accuracy* of the death sentence. Pet. Brief 15, n. 21. The *Strickland* Court only addressed the probable impact of an error on a jury's decision. It never addressed the propriety of the death sentence.

Defendant's standard, if adopted, will bring up a serious problem in those death penalties reversed as fundamental miscarriages of justice. If, on retrial, a defendant is again sentenced to death in spite of the factual errors being corrected, what will the federal habeas court do when confronted by a new habeas petition? It has already held that such a death sentence is fundamentally unjust. But if the constitutional errors have been corrected in the retrial, it has no ground to reverse the death sentence. The bar against successive petitions was meant to defuse tensions between state and federal courts not aggravate them. As the decision whether to grant mercy is inherently subjective, federal courts will have to rely on their instincts to determine how an error would influence the sentence. Thus, review of the accuracy of the individual-

ized sentencing process, cf. *Woodson*, *supra*, 428 U. S., at 304-305, will lead to an individual interpretation of the constitution unique to every federal habeas petitioner claiming a fundamental miscarriage of justice. Federal courts must be given sufficiently objective and precise standards to prevent this from happening. See *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 546, 111 S. Ct. 1454, 1471 (1991).

This Court adopted the cause and prejudice test for successive petitions in order to provide federal courts with a workable test that channels the discretion of the federal courts. *Id.*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. Requiring federal courts to ascertain the "accuracy" of an inherently subjective decision to impose the death sentence is at war with this principle. In order to review the accuracy of the sentence in light of a petitioner's claim of error, the habeas court will have to look at *all* the aggravating and mitigating circumstances. This cumbersome review of the record will be done each time a capital defendant files a successive petition claiming a fundamental miscarriage of justice. Thus, federal courts face the prospect of endless review of successive habeas petitions in, capital cases, each one alleging one new factual "inaccuracy" making the sentence unjust.

Capital defendants have every motive to engage in such a manipulation of habeas corpus. A typical habeas petitioner has nothing to lose in filing a successive petition. Someone on death row, however, has everything to gain by filing a petition. Each stay he receives pursuant to a pending petition allows him to frustrate the execution of his sentence. So long as he can delay execution through habeas corpus, he can "win" his case against the state. Putting federal courts in perpetual review of his sentencing hearing is one way to ensure this.

Inevitably, a reaction will set in against this abuse. Courts, to preserve their own schedules and to avoid being tools of delay, will give such claims at best cursory treatment. Justice Jackson's prophecy will then come true. The occasionally meritorious application will be "buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S. 443, 537 (Jackson, J., concurring in the judgment).

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation